

(16,121.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 391.

THE NORTHERN PACIFIC RAILROAD COMPANY ET AL.,  
PLAINTIFFS IN ERROR,

*vs.*

PATRICK R. SMITH.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript.....	1	1
Stipulation to omit certain exhibits from printed record.....	2	1
Transcript from U. S. circuit court, district of North Dakota.....	3	2
Caption to transcript.....	3	2
Complaint.....	3	2
Summons and marshal's return.....	4	4
Amended answer.....	4	4
Reply to amended answer.....	6	5
Stipulation waiving jury and agreed statement of facts.....	8	8
Exhibit 4—Summons in case of Nor. Pac. R. R. Co. <i>vs.</i> Browning <i>et al.</i> and sheriff's returns.....	12	11
5—Complaint in case of Nor. Pac. R. R. Co. <i>vs.</i> Browning <i>et al.</i> .....	13	12
6—Demurrer in case of Nor. Pac. R. R. Co. <i>vs.</i> Browning <i>et al.</i> .....	15	13
7—Notice of motion for judgment in case of Nor. Pac. R. R. Co. <i>vs.</i> Browning <i>et al.</i> .....	15	14
8—Judgment for plaintiff in case of Nor. Pac. R. R. Co. <i>vs.</i> Browning <i>et al.</i> .....	16	14

	Original.	Print.
Findings of fact .....	17	15
Defendant's proposed findings of fact.....	20	17
Judgment .....	21	19
Bill of exceptions.....	22	20
Agreed statement of facts.....	23	20
Letter, Secretary of Interior to Commissioner General Land Office, December 2, 1873.....	26	22
Letter, Secretary of Interior to the President, Novem- ber 28, 1873.....	26	23
Letter, Secretary of Interior to the President, Novem- ber 28, 1873.....	27	23
Report of Commissioner to Secretary of Interior, No- vember 24, 1873.....	28	25
Telegram, C. Delano, Secretary, to Steele <i>et al.</i> , com- missioners, October 20, 1873 .....	33	29
Affidavit of Geo. W. Cass, president Nor. Pac. R. R. Co.	34	29
Testimony of Charles A. F. Morris for defendant.....	35	30
Testimony of Montgomery Meigs for defendant.....	41	36
Defendant's request for findings of fact and exceptions to court's ruling thereon.....	47	41
Conclusions of law and defendant's exception.....	50	44
Defendant's further request for findings of fact, and ex- ceptions.....	50	44
Certificate of judge to bill of exceptions.....	52	45
Stipulation as to original exhibits.....	53	46
Assignment of errors.....	54	47
Petition for writ of error.....	61	53
Writ of error and clerk's return.....	62	54
Citation and admission of service.....	64	55
Bond on writ of error.....	64	56
Clerk's certificate to transcript.....	66	57
Appearance for plaintiff in error.....	67	58
Appearance for defendant in error .....	67	58
Appearance of C. W. Bunn and F. W. M. Cutcheon for plaintiff in error.....	68	59
Order: cause submitted.....	68	59
Opinion of U. S. circuit court of appeals.....	70	60
Judgment .....	73	62
Application for order staying mandate.....	73	62
Affidavit of J. H. Mitchell, Jr., in support of application for order staying mandate .....	74	63
Order staying mandate .....	77	65
Motion to make receivers parties plaintiffs in error.....	77	65
Order making receivers parties plaintiffs in error.....	79	66
Supersedeas bond.....	80	67
Writ of error and clerk's return.....	84	69
Citation and admission of service.....	87	71
Clerk's certificate to transcript.....	88	71

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1895, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday, to wit, the sixth day, of May, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest:

JOHN D. JORDAN,

*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

Be it remembered that heretofore, to wit, on the eighth day of November, A. D. 1894, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of North Dakota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in the case of The Northern Pacific Railroad Company, plaintiff in error, vs. Patrick R. Smith; which said transcript of record, as printed by the stipulation of the parties for the use of said court of appeals on the hearing of said case, is in the words and figures following, to wit:

2 United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, }  
 vs.  
 PATRICK R. SMITH, Defendant in Error. }

In error to the circuit court of the United States for the district of North Dakota.

In the above-entitled case it is hereby stipulated that the following exhibits may be omitted from the printed transcript of record, and that either party may refer to and use upon the argument the exhibits contained in the original transcript, to wit:

Exhibit "A," plat of Government township survey.

Exhibit "B," map purporting to be a copy of a portion of map of definite location east of the Missouri river, a distance of twenty-four miles, and to a point west of said river, a distance of about six miles.

Exhibit "C," map purporting to be a diagram showing the general route and definite location through townships in ranges 77, 78, 79, 80 and 81 west, in North Dakota, where said road crossed the Missouri.

Exhibit "1," map fixing definite location of line.

Exhibit "2," report of commissioners appointed to examine road with so much of map, Exhibit "C" referred to therein, as may affect the property involved.

Dated at St. Paul, Sept. 14th, 1894.

F. M. DUDLEY & J. H. MITCHELL, JR.,  
*Attorneys for Plaintiff in Error.*

STEVENS, O'BRIEN & GLENN,  
*Attorneys for Defendant in Error.*

U. S. — court of appeals, 8th circuit. No. 556. Northern Pacific Railroad Company, plaintiff in error, *vs.* Patrick R. Smith, defendant in error. Stipulation to omit certain exhibits from the printed record. Filed Nov. 8, 1894. John D. Jordan, clerk.

- 3      Pleas before the Hon. Alfred D. Thomas, judge of the district court of the United States in and for the district of North Dakota, sitting in the circuit court of the United States for the eighth circuit and said district of North Dakota, at the term of April, A. D. 1893.

PATRICK R. SMITH, Plaintiff,  
*vs.*

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Be it remembered that on the 28th day of December, 1891, a bill of complaint was filed in the office of the clerk of said circuit court in the above-entitled cause, which said bill of complaint is in words and figures following, to wit:

In the Circuit Court of the United States for the District of North Dakota.

PATRICK R. SMITH, Plaintiff,  
*vs.*

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

The complaint of the above-named plaintiff respectfully shows to this court and alleges that the plaintiff is and ever since the organization of the State of North Dakota has been a citizen thereof, and that prior thereto he was during all the time hereinafter mentioned a citizen of the Territory of Dakota.

That during all the time hereinafter mentioned the above-named defendant has been and still is a corporation created by and existing under and in virtue of an act of the Congress of the United States of America, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast, by the Northern route." Approved July 2nd, 1894.

That on the fourteenth day of September, A. D. 1876, the plaintiff became and ever since has been and still is duly seized in fee-simple and entitled to the possession of the following-described real property situated in the city of Bismarck, in the county of Burleigh and Territory of Dakota (now and since the organization thereof under a State government, the State of North Dakota), to wit:

Lots numbered five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11) and twelve (12), in block number eight (8) according to the recorded plat of the city of Bismarck, D. T., together with the hereditaments, privileges and appurtenances thereof and thereto belonging.



3½ That said defendant more than six years prior to the commencement of this action, wrongfully and unlawfully went into possession of the premises above described.

That said defendant ever since said entry has wrongfully and unlawfully retained and withheld and still does wrongfully and unlawfully retain and withhold the possession thereof from the plaintiff. And that the use and occupation thereof during said time was worth at least five thousand (\$5,000) dollars a year.

That the damage to the plaintiff by the wrongful withholding of the possession of the premises as aforesaid is the sum of (thirty) thousand (\$30,000) dollars.

Wherefore, the plaintiff demands judgment against said defendant for the possession of said premises and for the sum of thirty thousand (\$30,000) dollars, his damages as aforesaid together with his costs and disbursements herein.

F. H. REGISTER,

*Attorney for Plaintiff.*

STEVENS, O'BRIEN & GLENN,

*Counsel for Plaintiff.*

STATE OF MINNESOTA, } ss :  
County of Ramsey,

Patrick R. Smith, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing pleading and that the same is true of his own knowledge, except as to those things which are therein stated upon his information and belief and as to those things he believes it to be true.

(Signed)

PATRICK R. SMITH.

Subscribed and sworn to before me this 27th day of Nov., 1891.

[SEAL.]

EDWIN F. GLENN,

*Notary Public, Ramsey County, Minnesota.*

Upon the back of said bill of complaint appear indorsements in words and figures following, to wit:

Original. In the circuit court of the United States for the district of North Dakota. Patrick R. Smith against The Northern Pacific Railroad Company. (Complain.) Filed December 28th, 1891. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy. Stevens, O'Brien & Glenn, counsel for pl't'ff.

Thereupon afterwards, to wit, on the 28th day of December, 1891, a summons was issued in said case, which said summons is in words and figures following, to wit:

*Summons.*

UNITED STATES OF AMERICA, } ss:  
*District of North Dakota, Southwestern Division,*

In the Circuit Court of the United States for the District of North Dakota.

PATRICK R. SMITH  
*against*

THE NORTHERN PACIFIC RAILROAD COMPANY. }

The President of the United States of America to the defendant  
 above named, Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Bismarck, county of Burleigh and State of North Dakota, and file your answer in said clerk's office within thirty days after the service hereof, excluding the day (s) such service, and if you fail to answer the complaint as aforesaid, the plaintiff will apply to the court for the relief demanded and for the costs and disbursements of this action. For the marshal of the district of North Dakota to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 28th day of December, A. D. 1891. Issued at my office in the city of Bismarck, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.]

J. A. MONTGOMERY, *Clerk,*

By EDW'D S. ALLEN, *Deputy.*

F. H. REGISTER,  
*Plaintiff's Attorney.*

Upon the back of said summons appear indorsements in words and figures following, to wit:

United States circuit court, district of North Dakota, southwestern division. No. —. Patrick R. Smith, plaintiff, *vs.* The Northern Pacific Railroad Company, defendant. Summons. (Original.) Returned and filed Dec. 28, 1891. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy. F. H. Register, plaintiff's attorney.

DISTRICT OF DAKOTA, ss:

I hereby certify and return that on the 28th day of December, 1891, I received the within summons, and on the same day I served the same upon the within-named the Northern Pacific Railroad Company by John D. Davidson, the general agent for said  
 5 company in the city of Bismarck, Burleigh county, N. D., by delivering to and leaving with him a true copy thereof, with all the indorsements thereon.

A. F. PRICE, *U. S. Marshal,*  
 By MURDOCK MCKENZIE,  
*Deputy U. S. Marshal.*

Marshal's fees, \$2.00.

Thereupon afterwards, to wit, on the 5th day of April, 1892, an amended answer was filed in said case, which said amended answer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of North Dakota.

PATRICK R. SMITH, Plaintiff,  
*vs.*  
 NORTHERN PACIFIC R. R. Co., Defendant. }

The defendant for amended answer to the complaint herein:

First. For a first defense—

Alleges that the land mentioned in the complaint is situated within 200 feet of the center line of the road-bed of its line of railroad constructed through the State of North Dakota, and has been for more than 20 years in its lawful possession as its right of way, road-bed and depot grounds, and that the same was granted to it as a right of way by the act of Congress described in the complaint.

Admits that at all the times mentioned in the complaint the plaintiff was a resident of the city of Bismarck, in the State of North Dakota, and further admits that the defendant is a corporation created by the said act of Congress.

Denies each and every allegation in the complaint not hereinbefore specifically admitted, and it specifically denies that by reason of any of the allegations or things in the said complaint set forth the plaintiff has been damaged in any sum whatever.

Second. For a second defense—

That on the 9th day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh, in the 6th judicial district for the Territory of Dakota (now the State of North Dakota), for the same cause of action for which he has impleaded it in this action.

That at the time of the commencement of this action, said action was pending in said court and is still pending therein.

6 Third. For a third defense—

That on the 31st day of Jan., 1878, the defendant recovered judgment against the plaintiff for the possession of a portion of the property described in the complaint, to wit: that portion thereof described as lots 11 and 12, for \$.06 damages and for \$— costs, and that said judgment was rendered upon the cause of action mentioned in the complaint, which judgment is in full force, unreversed and unsatisfied.

Wherefore, the defendant demands judgment:

1. That the complaint be dismissed.
2. For its costs and disbursements in this action.

STATE OF NORTH DAKOTA, { ss:  
 County of Burleigh, }

Alexander Hughes, being first duly sworn, deposes and says he is attorney for the defendant in the above-entitled action; that he

has read the foregoing answer and knows the contents thereof, and that the same is true to his best knowledge, information and belief, and deponent further says the reason why the said answer is verified by the deponent and not by the defendant, is that the defendant is a corporation and all of its officers are absent from the county of Burleigh, wherein deponent resides.

ALEXANDER HUGHES.

Subscribed and sworn to before me this 4 day of April, 1892.

[L. s.]

M. P. SKEELS,

*Notary Public, Burleigh Co., No. Dak.*

Upon the back of said amended answer appear indorsements in words and figures following, to wit :

Original. Circuit court of the United States, district of North Dakota. Patrick R. Smith, plaintiff, *vs.* Northern Pacific R. R. Co., defendant. Defendant's amended answer. Due and personal service of the within admitted by copy this 4 day of April, 1892. F. H. Register, attorney for plaintiff. Filed Ap'l 5, 1892. J. A. Montgomery, clerk. Alexander Hughes, attorney for defendant, Bismarck, N. D.

Thereupon afterwards, to wit, on the 5<sup>th</sup> day of April, 1892, a reply was filed in said case, which said reply is in words and figures following, to wit :

7

*Reply.*

In the Circuit Court of the United States for the District of North Dakota.

PATRICK R. SMITH, Plaintiff,

*vs.*

THE NORTHERN PACIFIC RAILROAD COMPANY, Def't. }

Said plaintiff, for reply to the amended answer of said defendant, admits that on the 9th day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh in the 6th judicial district for the Territory of Dakota (now the State of North Dakota), for the same cause of action for which he has impleaded it in this action ; but alleges and avers that said action in said district court has been duly dismissed without prejudice to the plaintiff or to his right to maintain another action in any court whatsoever ; and that there is now no other action pending in any court between the parties to this action, involving the issues or cause of action involved in this action or any (*or any*) part of the same. He denies that the land mentioned in the complaint has been for more than twenty years, or for any other or greater or less period, or for any period whatsoever in the lawful possession of the defendant, as its right of way, road-bed and depot grounds, or for any other purpose, or in any other manner whatsoever, but he admits and avers that the southerly half of said premises has been

unlawfully used and possessed by said defendant partly for railroad and partly for other purposes, through persons to whom said defendant purported to lease the same for purposes connected with shipment and receipt of freight to and from the railroad of said defendant, for a period of eighteen years last past, and that the northerly half of said premises has been for a like period unlawfully occupied by said defendant through persons to whom it purported to lease the same, and that such occupation has not been for any of the purposes or uses mentioned in said answer.

He denies that said land or any part thereof has been in the possession of said defendant for twenty years, whether as stated in said answer or otherwise.

He denies that said defendant recovered judgment against the plaintiff on the 31<sup>st</sup> day of January, 1878, as stated in said answer, or at any other time or in any other manner whatsoever, and he denies that there is any such judgment as therein stated, or any judgment against him in favor of said defendant, in full force, unreversed and unsatisfied, or otherwise.

8 Wherefore, said plaintiff again demands judgment as prayed for in his complaint, notwithstanding anything in said answer contained.

F. H. REGISTER,  
*Attorney for Plaintiff, Bismarck, N. D.*

STATE OF NORTH DAKOTA, }  
County of Burleigh, } ss:

Patrick R. Smith, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated upon his information and belief, and that as to those matters, he believes it to be true.

PATRICK R. SMITH,

Subscribed and sworn to before me this 4th day of April, 1892.

[L. s.]

M. P. SKEELS,  
*Notary Public, Burleigh County, North Dakota.*

On the back of said reply appear indorsements in words and figures following, to wit:

In the circuit court of the United States for the district of North Dakota. Patrick R. Smith, pl'tff, vs. The Northern Pacific R. R. Co., def't. Reply. Due service at Bismarck, N. D., this 4th day of April, A. D. 1892, of the within reply is hereby admitted. Alexander Hughes, att'y for def't. Filed Ap'l 5, 1892. J. A. Montgomery, clerk. F. H. Register, att'y for pl'tff.

Thereupon afterwards, to wit, on the 16<sup>th</sup> day of March, A. D. 1894, an agreed statement of facts was filed in said case, which said agreed statement of facts is in words and figures following, to wit:

UNITED STATES OF AMERICA, }  
*District of North Dakota.* }

United States Circuit Court, Southwestern Division.

PATRICK R. SMITH, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

In the above-entitled action it is hereby stipulated that the following are the facts upon which the judgment of the court shall be rendered, and that a trial by a jury be and is hereby waived.

The property in controversy is eight lots in the city of Bismarck, in North Dakota, described as lots five (5) to twelve (12), inclusive, in block eight (8), which were a part of an eighty-acre tract of land that was entered by John A. McLean as mayor of that city, in behalf of its inhabitants, under the town-site act (Revised Statutes, sec. 2387), and was patented to him thereunder July 21, 1879. The corporate authorities of that city subsequently conveyed these lots to Patrick R. Smith, the plaintiff. The eighty-acre tract on which these lots are situated was selected as the location for a portion of this town site and surveyed prior to June 20th, 1872. In the year 1872, the attorney of the Lake Superior and Puget Sound Land Company—the company that first made this selection—commenced and thereafter continued to sell lots upon this town site according to a plat thereof, which was then made, and subsequently, on February 9, 1874, recorded in the office of the register of deeds of the county in which the land was situated. By the first of January, 1873, thirty buildings had been erected on the town site, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. It was upon the town site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and this patent contained no reservation of any right of way to the Northern Pacific Railroad Company.

The congressional township embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873, a copy of which is hereto attached and marked Exhibit "A."

On February 21st, 1872, the Northern Pacific Railroad Company filed in the Department of the Interior the map of its general route east of the Missouri river. This route passed about three-quarters of a mile south of this eighty-acre tract. On May 26, 1873, it filed with the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and he accepted, its map fixing the definite location of its line, a copy whereof is hereto attached and marked Exhibit "1." The Interior Department thereupon designated such line upon its record maps for its use, and copies of such record maps were forwarded to and remain on file in the office of the register and receiver of the land office at Bismarck, having jurisdiction of that



part of the public domain embracing the premises in question. Exhibits "B" and "C," hereinafter described, are copies of said record maps.

The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872, grading was done by the  
 10 company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one-quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading. During the year 1872, there was a line staked out across the tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the month of June, 1873, the railroad was constructed across this tract, and has since remained and been operated upon it. The grading on its line of definite location two miles south was abandoned. The lots in question are within two hundred feet of the main track of this railroad as actually constructed, and about two miles from its line of definite location as shown on its map filed to definitely (sic) this line, and have been occupied by the defendant and its tenants during the period in question, but no part of the same, except the rear twenty-five feet thereof, has ever been occupied for railroad purposes.

It is further stipulated, subject to plaintiff's objection and exception as to materiality, competency and relevancy of the evidence, that, after the road was constructed, commissioners were duly appointed by the President, under the provisions of section 4 of the act of incorporation of the defendant company, to examine and report thereon; that they performed their duty and duly reported, which report was forwarded to the President by the Secretary of the Interior under date of November 28th, 1873, and was approved by the President under date of December 1st, 1873; a copy of which report, and so much of the map accompanying the same and therein referred to as Exhibit "C," as may affect this controversy, and of the letter of the Secretary of the Interior transmitting the report to the President, and of the President's approval indorsed thereon, so far as it affects the premises in question, is hereto attached and marked Exhibit "2."

It is further stipulated that there shall be admitted and considered in evidence, subject to defendant's objection and exception thereto on the ground that the (same) are not the best evidence of the map of definite location filed by the defendant in the office of the Commissioner of the General Land Office, two maps, the one certified by S. M. Stockslager, Commissioner of the General Land Office, under date of April 27th, 1889, purporting to be "copy of portion of the map of definite location of the Northern Pacific Railroad Company east of the Missouri river a distance of 24 miles and to a point west of said river a distance of about 6 miles," which is hereto attached and marked Exhibit "B;" and the other certified by Thomas H. Carter, Commissioner of the General Land Office,  
 under date of March 17th, 1892, purporting to be "copy of a  
 11 diagram showing the general route, the map of which was



accepted by the Secretary of the Interior, February 21st, 1872, and the definite location of the Northern Pacific Railroad Company through townships in ranges 77, 78, 79, 80 and 81 west, in North Dakota, where said road crosses the Missouri river," which is hereto attached and marked Exhibit "C."

It is further stipulated that the testimony of one Charles A. F. Morris, given in the case of *The St. Paul and Pacific Railroad Company et al. versus Northern Pacific Railroad Company*, as contained in the printed transcript of the record of cause number 344 on the docket of the Supreme Court of the United States, October term, 1889, a copy whereof is hereto attached, marked Exhibit "—," shall be considered as a part of the evidence in this case, subject to the objection and exception of the plaintiff as to the materiality, competency and relevancy thereof.

It is further stipulated, subject to plaintiff's objection and exception as to the competency, materiality and relevancy thereof, that a certain action was heretofore commenced and (presecuted) in the district court of the third judicial district within and for the Territory of Dakota, in the county of Burleigh, in favor of the Northern Pacific Railroad Company against James Browning and others, including the plaintiff herein, defendants; and that Exhibits 4, 5, 6, 7 and 8 hereto attached are true copies of the record of said proceedings.

It is further stipulated that the value of the use and occupation of the premises in question for six years prior to December 28th, 1891, the date of the commencement of this action, is the sum of twenty-six thousand dollars (\$26,000.00); and that the value of the use and occupation of said premises, omitting that part thereof purporting to be affected by the proceedings set out in Exhibits 4, 5, 6, 7 and 8, is the sum of twenty-one thousand dollars (\$21,000.00).

It is further stipulated that the testimony of Montgomery Meigs, a witness produced by the defendant, a copy whereof is here attached and marked Exhibit "9," shall be considered as part of the evidence in this case subject to the objection and exception of the plaintiff as to the materiality, competency and relevancy thereof.

It is further stipulated that upon the facts and evidence hereinabove stipulated, and subject to the terms of this stipulation,  
 12 judgment shall be entered as of the adjourned April, 1893,  
 term of said court.

F. H. REGISTER,  
*Plff's Attorney.*  
 H. F. STEVENS, *Of Counsel.*  
 ALEXANDER HUGHES,  
*Def't's Attorney.*

F. M. DUDLEY AND  
 J. H. MITCHELL, JR.,  
*Of Counsel.*

Attached to said agreed statement of facts are exhibits numbered 4, 5, 6, 7 and 8, which said exhibits are in words and figures following, to wit:

## EXHIBIT 4.

TERRITORY OF DAKOTA, } ss:  
     County of Burleigh, }

In District Court, 3d Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl'tff,  
     vs.  
 JAMES BROWNING and JOHN WR-NGROSE, Copartners, Doing Busi-  
     ness under the Firm Name of Browning & Wringrose, and  
     P. R. Smith, Def'ts. }

The Territory of Dakota to Browning & Wringrose and P. R. Smith,  
 the above-named defendants:

You and each of you are summoned and required to answer the  
 complaint in this action, which is filed in the office of the clerk of  
 the district court in and for the county of Burleigh, D. T., and to  
 serve a copy of your answer upon the subscriber at his office in the  
 city of Bismarck within thirty days, exclusive of the day of service.  
 If you fail to answer the complaint within that time, plaintiff will  
 apply to the court for the relief demanded in the complaint.

Dated Aug. 31, 1877.

GEO. P. FLANNERY,  
*Att'y for Pl'tff.*

Upon the back of said Exhibit 4 appear indorsements in words  
 and figures following, to wit:

TERRITORY OF DAKOTA, } ss:  
     County of Burleigh, }

I hereby certify and return that at Bismarck, in said county, I  
 did serve the within summons upon P. R. Smith by handing to  
 and leaving with him a true and correct copy thereof, and  
 13 further, after diligent search that I was unable to find the  
     said Browning and Wringrose, or either of them within my  
 county, and that I served the within summons upon the said  
 Browning & Wringrose, and a person of proper age and discretion.

Dated this 3rd day of September, 1877.

ALEXANDER McKENZIE, *Sheriff.*

Service .....	\$1 20
Copy .....	50
Travel .....	20
	———— \$1 90

District court, Burleigh county. Northern Pacific Railroad Com-  
 pany vs. Browning & Wringrose and P. R. Smith. Summons.  
 G. P. Flannery' att'y for pl'tff.

## EXHIBIT 5.

*Complaint.*

TERRITORY OF DAKOTA, }  
 County of Burleigh. }

In District Court, 3rd Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff,  
*vs.*

JAMES BROWNING & JOHN WRINGROSE, Copartners, Doing Business under the Firm Name of Browning & Wringrose, and P. R. Smith, Def'ts. }

The complaint of the plaintiffs above named respectfully shows to this court and alleges, that the Northern Pacific Railroad Company is a corporation created by and exists under an act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route, approved July 2", 1864. That James Browning and John Wringrose are and have been for three years last copartners doing business under the firm name of Browning & Wringrose. That in May, 1873, plaintiff became seized in fee for the use and purpose of a right of way to the following-described real estate, viz:

That certain tract of land two hundred feet in width and three hundred feet in length, lying between Third and Fourth streets and north and along the railroad track in the city of Bismarck.

14 That Browning & Wringrose, one of the defendants above named, on or about the 1st day of October, 1874, wrongfully and unlawfully went to possession of that part of said tract of land described as follows, to wit:

Commencing at the corner of Main and Third streets, in the city of Bismarck, and running south along the east line of Third street seventy-five feet, thence east fifty feet, thence north to the south line of Main street, thence west on the south line of Main street to the place of beginning.

That on or about the 1st day of November, 1876, the said Browning & Wringrose rented said premises to P. R. Smith, who is now in the possession thereof.

That defendant wrongfully and unlawfully withholds the possession thereof from pl't'ff.

Wherefore the plaintiffs demands judgment for the possession of said premises, and for (five) hundred dollars the plaintiff's damages by withholding of the same and costs.

GEO. P. FLANNERY,  
*Att'y for Pl'ff.*

COUNTY OF BURLEIGH, ss:

Geo. P. Flannery came before me personally and being first duly sworn deposes and says he is att'y for pl'ffs above named; that he

has read the foregoing complaint and knows the contents thereof and that he believes it to be true; that all the material allegations are within his personal knowledge; that the reason why this verification is not made by plaintiff is that all the officers thereof are absent from the county of Burleigh, where resides this affiant.

GEO. P. FLANNERY.

Subscribed and sworn to before me this 1st day of Sept., 1877.

E. N. COREY,  
*Clerk of Dist. Court.*

On the back of said exhibit appear indorsements in words and figures following, to wit:

District court, 3rd judicial district. Northern Pacific Railroad Company *vs.* Browning & Wringrose & P. R. Smith. Complaint. Filed Sept. 1, 1877. E. N. Corey, clerk. Geo. P. Flannery, att'y for pl'ff.

15

EXHIBIT 6.

*Demurrer.*

TERRITORY OF DAKOTA, } ss:  
*County of Burleigh,*

In District Court, 3rd Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff,

*vs.*

JAMES BROWNING and JAMES WRINGROSE, Copartners, Doing Business under the Firm Name of Browning & Wringrose. }

And now comes the above-named defendant P. R. Smith by his attorney David Stewart and demurs to the complaint of the plaintiff for the following reasons, to wit: That it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action, in that it does not appear that the plaintiff is entitled to the possession of the premises described in the complaint.

Dated at Bismarck this 17<sup>th</sup> day of November, 1877.

DAVID STEWART,

*Att'y for P. R. Smith, Def't.*

To Geo. P. Flannery, att'y for pl'ff.

On the back of said exhibit appear indorsements in words and figures following, to wit:

District court, 3rd judicial district. Northern Pacific Railroad Co. *vs.* Browning & Wringrose and P. R. Smith. Demurrer of P. R. Smith. David Stewart, att'y for def't.

## EXHIBIT 7.

TERRITORY OF DAKOTA, }  
*County of Burleigh.* }

District Court, 3rd Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY

*vs.*

JAMES BROWNING and JOHN WRINGROSE, Copartners, Doing Business under the Firm Name of Browning & Wringrose, and P. R. Smith. }

Take notice that on the summons, complaint and demurrer, sheriff's return and affidavit of Geo. P. Flannery, a motion will be made before the Hon. A. H. Barnes, judge of the district court of Burleigh Co. aforesaid, at chambers in the city of Bismarck, on the 31<sup>st</sup> day of January, 1878, at 2 o'clock p. m. of that day for judgment in favor of plaintiff, on the demurrer herein as frivolous and for such other and further relief as may (—) just and equitable and costs.

Dated Jan. 30<sup>th</sup>, 1878.

GEO. P. FLANNERY,

*Att'y for Pl'ff.*

To David Stewart, Esq., att'y for def't.

## EXHIBIT 8.

TERRITORY OF DAKOTA, }  
*County of Burleigh,* } *ss:*

In District Court, Third Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY

*vs.*

JAMES BROWNING and JOHN WRINGROSE, Copartners, Doing Business under the Firm Name of Browning & Wringrose, and P. R. Smith. }

The above-entitled cause having been brought before the Honorable A. H. Barnes, judge of the 3rd judicial district aforesaid, at the city of Bismarck, in said county of Burleigh, on the 31st day of January, 1878—

On motion for judgment in favor of plaintiff on frivolous demurrer—

On reading and filing the notice of motion, the affidavit of Geo. P. Flannery, of no answer, demurrer or notice of appearance by Browning and Wringrose, and upon the summons and all the pleadings and proceedings in the case.

After hearing Geo. P. Flannery, in favor of said motion, and David Stewart in opposition thereto, it is ordered, decreed and adjudged, that the plaintiff have judgment herein on the demurrer as frivo-

lous, and that plaintiff recover possession of the real estate described as follows: That certain tract of land situated in the city of Bismarck, county of Burleigh, aforesaid, viz:

Commencing at the corner of Main and Third streets in the city of Bismarck, and running south along the east line of Third street seventy-five feet, thence east fifty feet, thence north to the south line of Main street, thence west on the south line of Main street to the place of beginning; and also six cents damages for the withholding possession thereof.

17 And also ten dollars (\$10.00) costs on motion and five dollars (\$5.00) costs of court, being the amount stipulated between the respective attorneys for the plaintiff and defendant.

Dated January 31st, 1878.

By the court:

A. H. BARNES, *Judge.*

Thereupon afterwards, to wit, on the 16<sup>th</sup> day of March, 1894, findings of fact were filed in said case, which said findings of fact were in words and figures following, to wit:

UNITED STATES OF AMERICA, }  
District of North Dakota. }

United States Circuit Court, Southwestern Division.

PATRICK R. SMITH, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

The above-entitled action having come on for trial by and before the court, at the adjourned April, 1893, term thereof, held at Bismarck in said district on the first Tuesday of March, A. D. 1894, upon an agreed statement of facts filed in said action, a jury having been duly waived; Messrs. F. H. Register and H. F. Stevens appearing as attorneys for plaintiff, and Messrs. F. M. Dudley and J. H. Mitchell, Jr., appearing as attorneys for defendant.

Now, after hearing the parties and a consideration of the matters set forth in the pleading and evidence, I find the facts to be as follows:

The property in controversy, the same being eight lots in the city of Bismarck in North Dakota, described as lots five (5) to twelve (12) both inclusive, in block eight (8), in the city of Bismarck, which was formerly known as Edwinton, and the name of which was changed by act of the legislature of the Territory of North Dakota to "Bismarck," was part of an eighty (80) acre tract of land which was entered by John A. McLean as mayor of the city of Bismarck, in behalf of its inhabitants, under the town-site act (Revised Statutes, sec. 2387), and was patented to him thereunder July 21st, 1879.

The corporate authorities of that city subsequently and more than six years prior to the commencement of the action, conveyed these lots to Patrick R. Smith, the plaintiff.



18       The eighty (80) acre tract on which these lots were situated, was selected as the location of a portion of this town site, and surveyed prior to June 20th, 1872. In the year 1872 the attorney of the Lake Superior and Puget Sound Land Company—the company that first made this selection—commenced and thereafter continued to sell lots upon this town site according to a plat thereof, which was then made, and subsequently, on February 9th, 1874, recorded in the office of the register of deeds of the county in which the land was situated. By the first of January, 1873, thirty buildings had been erected on the town site, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. It was upon the town site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and this patent contained no reservation of any right of way to the Northern Pacific Railroad Company.

The congressional town site embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873.

On February 21st, 1872, the Northern Pacific Railroad Company filed in the Department of the Interior the map of its general route east of the Missouri river. This route passed about three-quarters of a mile south of this eighty-acre tract. On May 26, 1873, it filed with the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and he accepted, its map fixing the definite location of its line. The Interior Department thereupon designated such line upon its record maps for its use, and copies of such record maps were forwarded to and remain on file in the office of the register and receiver of the land office at Bismarck, having jurisdiction of that part of the public domain embracing the premises in question. The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872 grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one-quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading. During the year 1872 there was a line staked out across this tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the year 1873 the railroad was constructed across this tract, and has since remained and been operated upon it. The grading on its line

19       of definite location two miles south was abandoned. The lots in question are within two hundred feet of the main track of this railroad as actually constructed and more than two miles from its line of definite location as shown on its map filed to definitely fix this line, and have been occupied by the defendant, through its tenants, during the period in question; but no part of the same, except the rear twenty-five feet thereof, has ever been occupied for railroad purposes.

In the year 1877 the defendant commenced an action in the district court of Burleigh county, Territory of Dakota (now State of



North Dakota), in which county the premises next hereinafter described were and are situated against certain parties including the plaintiff herein, to recover the possession or part of the premises here in question, which portion is particularly described as follows: Commencing at the southeast corner of Main and Third streets in the city of Bisinark, the same being the northwest corner of block eight (8), running thence east along the south line of said Main street, a distance of fifty (50) feet; thence south, parallel with the east line of said Third street, a distance of seventy-five (75) feet to said east line of said Main street a distance of fifty (50) feet, to said Third street; thence north, along said east line of said Third street, a distance of seventy-five (75) feet to the place of beginning. And such proceedings were duly had in said action in said court (the same being a court of competent jurisdiction of the parties and subject-matter of said action), that the defendant in the action herein (the plaintiff in the action last above referred to) duly recovered in said action a judgment against the defendants in that action including the plaintiff in this action, for the possession of the premises last above described and for nominal damages for the withholding thereof.

That the value of the use and occupation of the premises in question, for six years prior to December 28<sup>th</sup>, 1891, the date of the commencement of the action, is the sum of twenty-six thousand dollars.

From the foregoing facts I find as conclusions of law, that the plaintiff is entitled to the possession of the premises above described, and to recover from the defendant the sum of twenty-six thousand dollars, with interest thereon from the 28<sup>th</sup> day of December, A. D. 1891, at the rate of seven per cent. per annum, and his costs and disbursements.

Let judgment be entered accordingly.

ALFRED D. THOMAS.

Dated March 16<sup>th</sup>, 1894.

20 Attached to said findings of fact *was* the defendant's proposed findings of fact, which said defendant's proposed findings of fact *was* in words and figures following, to wit:

The foregoing having been submitted to counsel for defendant as the findings of fact to be made by the court in this cause, the defendant by its counsel thereupon and before the signing of said findings, the counsel for plaintiff being present, requested the court to make some finding of fact based upon the testimony of — Morris and — of Montgomery Meigs, witnesses on behalf of defendant, as (*tomthe*) line as designated on the map of definite location of a line of railroad as generally filed or as required to be filed under the various congressional railroad land grant acts, not being the line as finally located for the purposes of construction, and that it is frequently necessary in construction of a line of railroad to vary from the line as designated upon the map of definite location as filed, and that the term definite location as used in respect to the requirements for making or filing maps, showing the line of location does not include within its meaning final location as required

for purposes of construction, which request for some finding of fact based upon said testimony, was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth the defendant by its counsel excepts, which said exception is allowed. And the defendant then and there requested the court to find as one of the facts in this cause that the line as designated on the map of definite location of a line of railroad as generally made or filed, or as required to be made or filed under the various congressional railroad land grant acts is not the line as finally located for purposes of construction and that it is frequently necessary in construction of a line of railroad to vary from the line as designated upon the map of definite location as filed, and that the term definite location as used in respect to the requirements for making or filing maps showing the line of location does not include within its meaning final location as required for the purposes of construction, which request for finding of fact was refused by the court, to which refusal of the court to make said finding, defendant by its counsel excepts, which said exception is allowed. And the defendant further by its counsel requests the court that some finding may be made by the court based upon the testimony of Montgomery Meigs, a witness on behalf of the defendant, as to the necessity for the variation from the line as designated on the map of definite location as filed by the defendant to the line as finally constructed and now in operation over the premises involved in this action, and as to the line as designated upon said map being impracticable for purposes of safe or economical construction

21 which said request for some finding of fact based upon said testimony, was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth the defendant by its counsel excepts, which said exception is allowed. And the defendant then and there requested the court to find as one of the facts in this cause that the line as designated on the map of definite location as filed by defendant was not a line practicable for purposes of safe or economical operation, and that it became necessary in constructing the road of the defendant, on the approval of the same from the east to the Missouri river, and through the township in which the premises in question are situated, to vary from the line as designated on the map of definite location as filed to the line as constructed through the premises in question in order to obtain a line or route practicable for safe and economical operation, which said request for said finding of fact is refused by the court, to which said refusal of the court to make said finding, defendant by its counsel excepts, which said exception is allowed.

Thereupon afterwards, to wit, on the said 16th day of March, A. D. 1894, judgment was filed and entered in said case, which said judgment appears of record on page 73 of the journal of said court, southwestern division, and is in words and figures following, to wit :

UNITED STATES OF AMERICA, {  
District of North Dakota. }

United States Circuit Court, Southwestern Division.

PATRICK R. SMITH, Plaintiff,  
vs.  
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Adjourned April, 1893, term.

The above-entitled action having duly come on for trial at said term, before the court, a jury having been duly waived, and said cause having been duly (tr-ed) and determined by the court, and the court having made and filed its findings of fact and conclusions of law, it is hereby adjudged and determined :

That the plaintiff is, and ever since a period anterior to the 28th day of December, A. D. 1885, has been the owner in fee-simple and entitled to the possession of that certain real property described in the complaint and further known and described as lots five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11) and twelve (12), all inclusive, in block eight (8), of the city of Bismarck, (formerly known as Edwinton) according to the plat thereof on 22 file and of record in the office of the register of deeds of the county of Burleigh and State of North Dakota ; and that said defendant has wrongfully and unlawfully withheld the possession thereof from said plaintiff for a period of six (6) years prior to the twenty-eighth (28) day of December, A. D. 1891.

It is further adjudged and determined that said plaintiff (i-) entitled to recover from said defendant the sum of thirty thousand twenty-four and 21/100 (doll-rs,) as damages for the withholding of said property, together with the sum of seventy-five and 77/100 dollars, his costs and disbursements.

ALFRED D. THOMAS, Judge.

Upon the back of said judgment appear endorsements in words and figures following, to wit :

Patrick R. Smith vs. N. P. R. R. Co. Judgment. Filed March 16th, 1894. J. A. Montgomery, clerk, by R. D. Hoskins, deputy.

Thereupon afterwards, to wit, on the said 16th day of March, A. D. 1894, a bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit :

UNITED STATES OF AMERICA, }  
*District of North Dakota.* }

*Bill of Exceptions.*

United States Circuit Court, District of North Dakota, Southwestern  
 Division.

PATRICK R. SMITH, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

This cause, which was an action of ejectment, for the recovery of certain real estate described as lots five (5) to twelve (12), inclusive, in block eight (8), in the city of Bismarck, North Dakota, and for damages for the withholding of the possession thereof for six years prior to the commencement of the action, came on for trial by and before the court on the sixteenth day of March, 1894, at the adjourned April, 1893, term thereof, convened at Bismarck, in said district, on the first day of March, A. D. 1894.

Said trial being commenced and proceedings before the judge of said court without a jury, it having been stipulated by stipulation in writing filed in this cause, by the parties thereto, that the case

should be tried without a jury, and, thereupon, Messrs. F. H. Register and H. F. Stevens appearing for the plaintiff, and  
 23 F. M. Dudley and J. H. Mitchell, Jr., appearing in behalf of the defendant, it was agreed between the parties in interest by stipulation in writing, placed upon file, that the facts in this case, in addition to those facts established by the pleadings, are as follows:

That the property in controversy is eight (8) lots in the city of Bismarck, North Dakota, described as lots five (5) to twelve (12), inclusive, in block eight (8), which were a part of an eighty (80) acre tract of land that was entered by John A. McLean, as mayor of the city, in behalf of its inhabitants, under the town-site act (Revised Statutes, section twenty-three eighty-seven—2387), and was patented to him thereunder (Jult) twenty-first (21), 1879.

The corporate authorities of that city subsequently conveyed these lots to Patrick R. Smith, the plaintiff.

The eighty (80) acre tract on which these lots are situated was selected as the location for a portion of this town site and surveyed prior to June twentieth, 1872.

In the year 1872, the attorney of the Lake Superior and Puget Sound Land Company—the company that first made this selection—commenced, and thereafter continued, to sell lots upon this town site according to a plat thereof, which was then made, and subsequently, on February ninth, 1874, recorded in the office of the register of deeds of the county in which the land was situated.

By the first of January, 1873, thirty (30) buildings had been erected on the town site and from that time until the patent was issued the population of the city and the improvements in it continued to increase.

It was upon the town site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and this patent contained no reservation of any right of way to the Northern Pacific Railroad Company.

The congressional town site embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873, a copy of which marked Exhibit "A," is attached to the stipulation hereinbefore referred to as having been filed in this case, which said copy as so attached to said stipulation was used as evidence in this case, and is, by this reference thereto, made a part of, and included within this bill of exceptions.

24 On February 21st, 1872, the Northern Pacific Railroad Company filed in the Department of the Interior the map of its general route east of the Missouri river. This route passed about three-quarters of a mile south of this eighty-acre tract.

On May 26th, 1873, it filed with the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and he accepted, its map fixing the definite location of its line, a copy whereof marked Exhibit "1," is attached to the stipulation hereinbefore referred to as having been filed in this case; which said copy as so attached to said stipulation was used as evidence upon said trial and is, by this reference thereto, made a part of, and included in this bill of exceptions.

The Interior Department thereupon designated such line upon its record maps for its use, and copies of such record maps were forwarded to, and remain on file in, the office of the register and receiver of the land office at Bismarck, having jurisdiction of that part of the public domain embracing the premises in question.

Exhibits "B" and "C," hereinafter described, are copies of said record maps.

The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872, grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one-quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading.

During the year 1872, there was a line staked out across this tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873.

In the month of June, 1873, the railroad was constructed across this tract, and has since remained and been operated upon it. The grading on its line of definite location two miles south was abandoned. The lots in question are within two hundred (200) feet of the main track of this railroad as actually constructed and about two (2) miles from its line of definite location as shown on its map filed to definitely fix this line, and have been occupied by the defendant and its tenants during the period in question, but no part of the same, except the rear twenty-five (25) feet thereof, has ever been

occupied for railroad purposes. That the premises in question were public lands of the United States on the second day of July, 1864.

By virtue of the provisions of the stipulation filed as aforesaid, it was agreed between the parties in interest, subject to the plaintiff's objection and exception as to the materiality, competency and relevancy of the evidence, that it was and is a fact that after the road was constructed commissioners were duly appointed by the President under the provisions of section four (4) of the act of incorporation of the defendant company, to examine and report thereon. That they performed their duty and duly reported, which report was forwarded to the President by the Secretary of the Interior under date of November 28th, 1873, and was approved by the President under date of December first, 1873, a copy of which report and of so much of the map accompanying the same and therein referred to as Exhibit "C" as may affect the controversy involved in this action, and of the letter of the Secretary of the Interior transmitting the report to the President and of the President's approval indorsed thereon so far as it affects the premises in question, is attached to the stipulation hereinbefore referred to as having been filed in this case; the said copy as so attached, being marked Exhibit "2," which said fact as agreed upon by said stipulation -ith respect to the examination of said road by the commissioners, the report of their examination and of the approval of the President and said copy of said report and of said map and of the letter of the Secretary of the Interior and approval of the President indorsed thereon, as so attached to said stipulation, were, in accordance with the terms of said stipulation, offered and introduced upon the trial of said cause as evidence on behalf of the defendant. Said copy of said report and of the letter of the Secretary of the Interior transmitting the same to the President and of the President's approval indorsed thereon, as offered to be introduced as aforesaid, was and is in words and figures as follows, to wit:

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
WASHINGTON, D. C., *February 25, 1894.*

I, S. W. Lamereaux, Commissioner of the General Land Office, do hereby certify that the annexed copies, to wit:

1. Copy of the letter of the Secretary of the Interior, to this office, bearing date December 2, 1873, transmitting map marked "C" of the Northern Pacific railroad, constructed from the Red River of the North to the Missouri river in North Dakota—

2. Copy of the enclosure therein referred to as a copy of the Secretary's letter to the President, dated November 28th, 1873, recommending the acceptance of said constructed road, and the President's approval thereon—

26 3. Copy of section 10 of said map, marked "C," showing the construction of said road from the 180 to the 196.4 miles, are true and literal exemplifications of the originals on file in this office.

In testimony whereof, I have hereunto subscribed my name and



caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

S. W. LAMOREAUX,  
*Commissioner of General Land Office.*

(Copy.)

3 B. S.

DEPARTMENT OF THE INTERIOR,  
WASHINGTON, D. C., 2nd Dec., 1873.

SIR: I transmit herewith for appropriate action, the map of the Dakota division of the Northern Pacific railroad, from the Red River of the North to the Missouri river, 196.4 miles, examined recently by commissioners, and accepted by the President of the United States yesterday, copy of acceptance herewith, & also of dep't letter of 28th ult.

A profile of this portion of the road is traced on the map.

Very respectfully, &c.,

C. DELANO, *Secretary.*

Hon. Willis Drummond, Com'r G. L. O.

(Copy.)

DEPARTMENT OF THE INTERIOR,  
WASHINGTON, D. C., 28th Nov., 1873.

SIR: I have the honor to transmit herewith, for your action, the report of Messrs. Steele, Sands and Le Duc, commissioners appointed by your order to examine and report upon a portion of the Northern Pacific railroad.

Under date of 24th instant, these gentlemen reported on said portion (commencing) at Fargo, on the west bank of the Red river in Dakota Territory, and terminating at Bismarek, on the east bank of the Missouri river, 196.4 miles.

The commissioners in their report represent that this portion of road has been (in the main) constructed in a first-class manner, I, therefore, recommend the acceptance of the same and the  
27 issue to the company of patents for lands due on account of the completion thereof.

Very respectfully, your ob't servant,

C. DELANO, *Secretary.*

The President.

(Copy.)

#### EXHIBIT "2."

UNITED STATES OF AMERICA,  
DEPARTMENT OF THE INTERIOR,  
WASHINGTON, D. C., Feb. 2, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original of record and on file in the department, together with its indorsement.

In testimony whereof, I have hereunto subscribed my name and



caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

W. H. SIMMONS,  
*Acting Secretary of the Interior.*

(Copy.)

Lands and railroads.

DEPARTMENT OF THE INTERIOR,  
WASHINGTON, D. C., 28th Nov., 1873.

SIR: I have the honor to transmit herewith for your action the report of Messrs. Steele, Sands and Le Duc, commissioners appointed by your order to examine and report upon a portion of the Northern Pacific railroad.

Under date of 24th instant, these gentlemen reported on said portion, commencing at Fargo, on the west bank of the Red river, in Dakota Territory, terminating at Bismarck, on the east bank of the Missouri river, 196.4 miles.

The commissioners in their report represent that this portion of the road has been (in the main) constructed in a first-class manner, I therefore, recommend the acceptance of the same, and the issue to the company of patents for lands due on account of the completion thereof.

Very respectfully, your ob't servant,

C. DELANO, *Secretary.*

The President.

(Copy.)

Indorsement: Northern Pacific 2nd sec., 196.4 m. Department of the Interior, 28th Nov., 1873. Columbus Delano, Secretary, submits to the President report of commissioners on 196.4 miles of Northern Pac. railroad. Executive Mansion, Dec. 1st, 1873. The within recommendations are approved. Seal. U.S. Grant. Sturges. Copy to G. L. O. 2 Dec., '73. Mr. Case notified same day.

Copy.

UNITED STATES OF AMERICA,  
DEPARTMENT OF THE INTERIOR,  
WASHINGTON, D. C., Feb. 2, 1894.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the originals on file in this department.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

W. H. SIMMS,  
*Acting Secretary of the Interior.*

(Copy.)

WASHINGTON, D. C., Nov. 24th, 1873.

Hon. Columbus Delano, Secretary of the Interior.

SIR: Pursuant to instructions, bearing date October 2nd, 1873, the undersigned, commissioners to examine a completed portion of the Northern Pacific railroad "on its main line between the Red River of the North and the Missouri river" have the honor to submit the following report:

Upon reaching Fargo, at the eastern end of the division which we were directed to examine, we found that owing to the absence of the president of the company, we could not, without great delay, obtain the requisite affidavit of that officer showing "the commencement, termination and length of the road, to be examined" and affirming its completion as required by the Government. We therefore, telegraphed asking for instructions, and were directed to proceed with the examination and secure the required affidavit before making our report. A copy of the instructions is submitted herewith marked "A."

The president's affidavit is also herewith submitted marked "B."

The required map "showing the connection of the line of the road with the line of the public surveys where the latter have been run; also showing the radii and lengths of curves and courses of tangents" with other data as specified in the instructions issued by the Interior Department, bearing date April 28th, 1871, is also transmitted herewith marked "C" and has attached to it the requisite affidavit of the chief engineer, duly attested by the president and secretary of the company.

#### Location of the road.

After a thorough examination, we find that the line is so located as to serve the purposes both of a central and convenient channel for the trade and travel of the county through which it passes, and that proper regard has been paid to future as well as to present needs of local and also of through traffic.

#### Grades and curves.

The grades of the road as now constructed are shown by the following statement, taken from the map and profile transmitted herewith marked "C."

#### Grades ascending west.

Less than 10 feet per mile.....	22.05
From 10 to 20 feet per mile.....	18.66
From 20 to 30 feet per mile.....	11.45
From 30 to 40 feet per mile.....	14.60
From 40 to 50 feet per mile.....	11.69
From 50 to 60 feet per mile.....	15.

## Grades ascending east.

Less than 10 feet per mile .....	17.03
From 10 to 20 feet per mile .....	8.88
From 20 to 30 feet per mile .....	9.07
From 30 to 40 feet per mile .....	9.98
From 40 to 50 feet per mile .....	18.51
From 50 to 60 feet per mile .....	1.86
Grade level.....	37.62

Total length of the division ..... 196.40 miles.

30

## Curves.

The sharpest curve on the division is 3 degrees. All the grades and curves come within the limits fixed by the Government and their number and extent are not greater than is justified by practical and economical construction.

## Excavations and embankments.

The excavations comply with the requirements of the Government and are in good condition. Some of the embankments however are not fully up to the standard laid down in the instructions required for a first-class road, but they are all that is required for the present and near future business of the road, and we are assured by the officers of the company that they have made ample arrangements to bring them all up to the standard by a first-class road, in the coming spring.

## Mechanical structures.

The number of bridges on the division is 58, described as follows: Howe truss bridges, 3 of 150-feet span each, with well-constructed trestle approaches; trestle bridges, 25; pile bridges 30; the aggregate approaches; trestle bridges, 25; pile feet and of the pile bridges 6,010 feet. The Howe trusses are substantially built, of sound material, and are in excellent condition. The trestle and pile bridges are also well constructed and fully adequate to the requirements of the traffic of the road. There are 170 culverts on the division of which 21 are box, 12 open and 137 pipe. These are of sufficient strength and capacity to serve their intended purpose and are all in good condition. The box and open culverts as well as the abutments of the bridges, are constructed of timber, no stone suitable for that purpose having been found within a reasonable distance on the line of the road.

## Sidings.

The sidings on the division are 24 in number and their aggregate length is 38,555 feet. Their location is judicious and their capacity ample for all the present requirements of the business of the road.

### Ballasting.

Going west from the Red River of the North the road-bed for a distance of about fifty miles is well ballasted with gravel. On a portion about thirty miles in length the embankments have been made generally of the material taken from the excavations, which is composed mainly of gravel and sand. This, with the corresponding excavations, makes about sixty miles of road. The bal-

31      ance of the road is made chiefly of material taken from the immediate vicinity of the line and the material varies in quality being part gravel, part sand and part clay, more or less mixed with the soil. We found the entire line of the road, lying between the Red River of the North and the Missouri river in a smooth condition (and its business well managed). Passenger and freight trains were running over it daily and regularly at fully the average rate of speed on other new roads. The freight received at Bismarck between June 8th and October 15th of the present year amounted to over eight thousand tons.

In our judgment the ballasting of the road has progressed as rapidly and thoroughly as has been prudent, having due regard to the climate and condition existing where gravel and stone do not largely enter into the composition of available material and having regard also to the length of time which should be given for the proper settling of new embankments, so large a portion of the road having been completed within the present year.

### Cross-ties.

The cross-ties are laid 2,640 to the mile as the Government requires. About fifty per cent. of them are of Norway pine, about forty-two per cent. of tamarac and about eight per cent. of oak and all are of dimensions, specified in the instructions of the department. The adoption of the fish-joint has obviated the necessity of making a choice of timber for the ties laid at the breakage of joints.

### Rails.

The rails weigh 56 pounds to the yard, are of American manufacture, and in our judgment, meet the requirements of the Government both as to quality and manner of laying.

### Rolling stock.

The rolling stock upon the division is as follows: Locomotives 28; passenger cars 10; mail, baggage and express cars 5; cabooses 11; platform cars 400; coal cars 19; box cars 240; tool car 1; pay car 1; derrick car 1; pile-driver 1; sand cars 30; rubble cars 30; gravel cars 90; snow-plows 5.

All this stock is in excellent condition and it is sufficient in quantity to do the present business of the road and also that increased business probable in the near future.

### Engine-houses and repair shops.

The Northern Pacific Railroad Company has its main buildings and repair shops, extensive and well equipped, at Brainard, on the Minnesota division. There are branch shops at Fargo and 32 Bismarck, located respectively at the eastern and western terminus of this division. The buildings at Fargo are constructed of brick and with the main shops located at Brainard, of which this division has all the advantages, although they are not located directly on its line, furnish ample facilities for purposes of repair and protection of machinery. The company have on hand a stock of iron, wood and other material for building and repairing machinery and all necessary supplies for the immediate use of the road. There is also an engine-house located at Jamestown, nearly central between the termini of the division.

### Passenger, freight, and water stations.

There are six freight and passenger stations on the division, varying in size from 12 x 16 feet to 20 x 65 feet, and built of wood. They are judiciously located with reference to the passenger and freight business of the division and are fully adequate to its present wants. The water stations are ten in number with an aggregate capacity of 201,850 gallons. They are substantially built on an approved plan, and provided with such protection against freezing as is deemed sufficient.

### Snow-fences.

Alongside many of the deep excavations on the line the company have built snow-fences in double or single line, on either side according as the excavations are deep or shallow. Between the line of the track and these fences the spaces are about one hundred feet wide and the space between the rows of fencing, where it is double, is about the same width. The fences are eight feet high, the posts set two and a half feet in the ground and the boards are six inches wide, the spaces between them being four inches.

There are  $37\frac{1}{2}$  miles of snow-fences, of which 20 miles is single, and  $17\frac{1}{2}$  miles double.

### Telegraph line.

The telegraph line along the division is well constructed and equipped, with facilities ample for the wants of the road and the public.

### Conclusion.

As it may be questionable whether all of that portion of the road located from the 195th mile to the western terminus, should be treated as a part of the main line, we would respectfully call attention to its location as shown by the map marked "C" and forming a part of this report.

After a careful examination of the Dakota division of the North-

ern Pacific railroad commencing at the east bank of the Red River of the North and terminating at the Missouri river in the Territory of Dakota being 196 $\frac{4}{10}$  miles in length, as appears by the affidavit of the president of the company and the map herewith marked "C," we find its construction and equipment throughout to be in accordance with the instructions furnished for our guidance by the Interior Department, and we therefore respectfully recommend the acceptance of the road by the Government.

We have the honor to be with great respect,

Your ob't servants,

GEO. W. STEELE,

A. C. SANDS,

WM. G. LE DUC,

*Commissioners.*

Subscribed and sworn to before me at the city of Washington, District of Columbia, this 25th day of November, 1873.

[SEAL.]

THOMAS G. CONNOLLY,

*Notary Public.*

(Copy.)

Blank No. 1.

The Northwestern Telegraph Company.

The rules of this company require that all messages received for transmission, shall be written on the message blanks of the company, under and subject to the conditions printed thereon, which conditions have been agreed to by the sender of the following message:

C. H. Haskins, gen'l sup't, Milwaukee, Wis.; Z. G. Simmond, pres't;  
H. B. Hinsdale, sec'y, Kenosha, Wis.

No. 2.

Dated, Washington, D. C., Oct. 20, 1873.

Received at Bismarck, D. T., 11," 21st.

To Geo. W. Steele, W. G. Le Duc, A. C. Sands, commissioners:

Proceed with examination, affidavit can be obtained before mailing report.

C. DELANO, *Secretary.*

29 paid Gov't rt.

Via Atlantic & Pacific lines,

To Chicago, 3 ex. W. M. Date.

(Copy.)

34

NORTHERN PACIFIC RAILROAD COMPANY,

PRESIDENT'S OFFICE, 23 FIFTH AVENUE,

NEW YORK, Oct. 21, 1873.

STATE OF NEW YORK,

City & County of New York, } ss:

George W. Cass, being sworn, says that he is the president of the Northern Pacific Railroad Company, that the Dakota division of

the said company's road, which the President of the United States has appointed commissioners to examine, commences at Fargo on the west bank of Red river in Dakota Territory, and terminates at Bismarck on the east bank of the Missouri river, that the length of said division of road is 196 $\frac{4}{10}$  miles and that the said division of road is completed as required by law and the instructions of the Department of the Interior.

G. W. CASS.

Personally appeared before me, a notary public in and for the city and county of New York, George W. Cass, to me personally known and made oath that the contents of the above affidavit subscribed by him are true to the best of his knowledge and belief.

New York city, October 22d, 1873.

[SEAL.]

M. TURNER FOREMAN (72),

*Notary Public, N. Y. Co.*

(Copy.)

The same being a true and correct copy of all of said Exhibit "2," as attached to said stipulation, except the map referred to as Exhibit "C," which said map is, by this reference thereto, made a part of and included in this bill of exceptions.

That said fact as agreed upon, and said copy of said report of said commissioners with the accompanying papers, having been offered in evidence on behalf of the said defendant in pursuance of the terms of said stipulation, upon consideration of the same, the plaintiff made objection thereto on the ground of the same being incompetent, irrelevant and immaterial; which said objection was sustained by the court, to which said ruling of said court holding such evidence to be incompetent, irrelevant and immaterial, the defendant then and there excepted, which said exception was allowed.

In pursuance of the stipulation, filed as aforesaid, there were offered and introduced in evidence, on behalf of the plaintiff on the trial of said cause, two (2) maps, the one certified by S. M.

Stockslager, Commissioner of the General Land Office, under  
35 date of April 27th, 1889, purporting to be a copy of a portion  
of the map of definite location of the Northern Pacific railroad, east of the Missouri river, a distance of twenty-four (24) miles, and to a point west of said river a distance of about six (6) miles; which said map, marked Exhibit "B," is attached to the stipulation hereinbefore referred to as having been filed in this cause; which said map as so attached to said stipulation is, by this reference thereto, made a part of and included in this bill of exceptions; and, the other of said maps, being certified by Thomas H. Carter, Commissioner of the General Land Office, under date of March 17th, 1892, purporting to be a copy of a diagram showing the general route, the map of which was accepted by the Secretary of the Interior, February 21st, 1872, and the definite location of the Northern Pacific railroad through township in ranges seventy-seven (77) seventy-eight (78), seventy-nine (79), eighty (80), and eighty-one



(81), west in North Dakota, where said road crosses the Missouri river, which said map marked Exhibit "C," is attached to the stipulation referred to as having been filed in this cause, which said map as so attached to said stipulation is, by this reference thereto, made a part of and included in this bill of exceptions. That said map having been offered and introduced as evidence on behalf of the plaintiff on the trial of said cause in accordance with the terms of said stipulation, upon consideration of the same the defendant made objection thereto on the ground that the same were and are not the best evidence of the map of definite location filed by the defendant in the office of the Commissioner of the General Land Office, which said objection was overruled by the court, to which ruling of the court holding that said maps were competent and sufficient evidence of the map of definite location filed by the defendant in the office of the Commissioner of the General Land Office, the defendant then and there excepted, which said exception was allowed.

That by virtue of the provisions of said stipulation it was agreed that the testimony of one Charles A. F. Morris, given in the case of *The Saint Paul and Pacific Railroad Company et al. against The Northern Pacific Railroad Company*, as contained in the printed transcript of record of cause number 344 on the docket of the Supreme Court of the United States, October term, 1889, a copy whereof marked Exhibit "3," is attached to the stipulation hereinbefore referred to as having been filed in this cause, should be considered as a part of the evidence in this case, subject to the objection and exception of the plaintiff as to the materiality, competency, and relevancy thereof.

36 That in pursuance of said agreement of said stipulation, said testimony was offered and introduced as evidence in this case on behalf of the defendant, and as so offered and introduced was and is as follows, to wit:

Q. Where do you reside, and what is your occupation or profession?

A. I reside in St. Paul; am a civil engineer by profession.

Q. State whether such variations in the line constructed or to be constructed from the line as surveyed and platted in Exhibit "6," were of frequent occurrence along the whole line.

A. Such changes and variations took place over a considerable portion of the line, necessarily caused by having to put in the curvature to connect (tange-ts) or straight lines, which were not originally staked on the location survey; also in a few instances changes were made by local petition of the inhabitants, such as at Osakis, St. Joe, Melrose, and other places.

Q. In making the survey of 1871, indicated by Exhibit "6," what was done on the ground?

A. The ground was examined carefully and a line of road selected and marked thereon by stakes driven in the ground at average distances of 100 feet; change of courses marked by large hubs. All natural features, such as rivers and elevations, noted.

Q. State what experience you have had in the matter of railroad engineering, Mr. Morris.

A. I have performed professional services on a great number of railroads, both in Europe and America; I spent  $5\frac{1}{2}$  years on the Hudson River railroad, Albany and Troy, 1 year; Chicago & Alton & St. Louis, several years, and until completed. In Minnesota I have been connected with the railroad system since it started; I assisted in the location of the lines of the first division of the St. Paul & Pacific Railroad Co., from St. Paul to Breckenridge, St. Paul to St. Cloud, as far as the office work was concerned, and located in the field the Winona branch. These Minnesota roads are all land grant roads.

Q. State whether or not on each of these land-grant roads with which you were connected, and on all other land-grant roads, as far as you know, a line of definite location does not proceed the work of construction.

A. It does.

Q. And those lines are filed with the governor, as in this case?

A. Always.

Q. State whether in the actual construction, it is not  
37 necessary to depart, more or less, from this line, and fully explain the matter.

A. It is most always necessary to make changes from the original location, within reasonable limits, frequently called for by the curvature not being staked out on the original record maps, and by changes necessary to be made by bad marshes and lakes through which the original location ran, and which, on a close examination of the ground, preparatory to construction, admitted of improvements being made. Such changes, as far as I am aware of, were permitted and approved by the Government when within reasonable limits.

Q. By saying that the line of road indicated on Exhibit "6" is the line of definite location, you do not mean to say that it is the precise line upon which the road has been or is to be constructed, but that it is the approximate line of route?

A. It is not the precise line as shown in Exhibit 6 in all cases, but the general route between the terminal points is the same, only varied by changes necessitated by engineering necessities, as explained in my previous testimony.

Q. In making the survey of a line of railroad for construction, what is done by the engineers upon the ground?

A. They go on the ground and examine the location previously made and see if improvements can be made in any portion of the line between certain points about to be constructed; if the reconnaissance of the line would show that improvements can be made, experimental lines are run and staked on the ground, distances and levels taken with which to make comparisons with the original survey of definite location. If those new surveys show improvements can be made a new line designed for construction is laid out, staked, and prepared for grading and a new location tied up to the U. S. Government land surveys, showing the route and change of loca-

tion, if any, from the original definite location. Stakes are driven at an average distance, on a straight line, of 100 feet apart, and by large hubs at the tangent points when curves leave, which tangent hubs are usually tied up by witness stakes, so as to be replaced in case of being knocked down or destroyed. Curves are usually staked out at intervals of fifty feet. Afterward to prepare the work and make it plain to the contractors or laborers, grade stakes are placed at and opposite the stakes heretofore driven, marked with the height of the cut or fill plainly also stakes placed at the base or bottom of the slope on fills and on cuts where the slope commences.

Q. Have you not been just describing what is known in railroad engineering as the construction survey, as distinguished from the survey of definite location of the line?

A. Yes.

38 Q. Now describe the survey of definite location of the line as contradistinguished from the construction survey.

A. The country lying between the points designed to be connected with the line of railroad is first carefully examined by the engineer placed in charge of such survey. He takes notes of leading points that he designs to run by in the general direction of the proposed line, taking care to avoid all natural obstructions that should necessitate large cost and trouble to the company proposing to build the line. He then commences with his party to run out by course and distance and stake on the ground a proposed line, carefully noting all changes of courses, and taking the levels of line as he proceeds, in order to enable him to judge of the feasibility of the line he has previously staked out. If the line is satisfactory, he takes field-notes showing the general topography of the country adjoining and ties up or connects his line with the U. S. Government surveys, if they exist in the locality, so as to enable him to make an accurate map showing his location and the natural features of the country through which the route runs, his stakes being placed at intervals of 100 feet.

Q. Such line becomes a line upon the ground does it not?

A. It does.

Q. Was not the line of definite location marked upon Exhibit "6" established in the manner you have just described?

A. It was.

Q. Witness is shown Exhibit "2" and is asked to examine the continuous red line marked on said map, "Amended line Northern Pacific railroad," and asked to state if he is familiar with the general features of the country through which that line runs.

A. I have passed over that portion of it between Duluth and Georgetown, on the Red River of the North, several times.

Q. Describe the general features of the country with reference to engineering difficulties in the way of railroads.

A. The line coming westward from Duluth passes through a very rough country composed mostly of lofty hills of granite and trap rock, and intersected in various places by deep ravines and marshes, thence it passes out into a level country composed of nearly continuous marsh to where it strikes the Mississippi river; thence through

an alternately rough and marshy country interspersed with lakes and sink-holes—mud-holes. From Brainerd westward to the Otter Tail country the land is broken and rolling, partly covered with timber and partly prairie, interspersed with numerous lakes and marshes, so frequently met with that the distance between them appears very short indeed; thence to Georgetown the line

39 passes over a prairie country interspersed with numerous lakes and marshes the whole line presenting a difficult country to select a line that could be built with any degree of economy. From the numerous natural obstacles presenting themselves it would and did take a long time for the locating engineers to select a line that would be adapted for construction. When construction was going on it was found necessary to make certain local changes in the line caused by unfathomable sink-holes and marshes but which by superior engineering skill were successfully surmounted.

Q. Would it be possible for any corps of engineers to make a line of definite location of a railroad upon the line to which your attention has been called on Exhibit "2?"

A. It would be possible but highly absurd and injudicious to waste time and money in staking out a line in direct course, as shown on Exhibit "2," between Duluth and the west line of town 135, R. 39.

Q. In round numbers, what per cent. would be the increased cost of such a line over that of a line such as would ordinarily be selected by competent engineers?

A. I could not say nor do I believe any engineer could tell except by giving a wild guess at it, but I could say the expense would be very largely in excess of a line properly explored, probably from 50 to 100 per cent. more, so far as the road-bed is concerned.

Q. State whether any line that might be located by any engineer of competence through that country would not have about the same curvatures in the general course as the one actually located there and constructed by the plaintiff company.

A. I think so. I think the engineers who made that location were good and capable men, who devoted themselves for a long period and at a great expense in selecting the line they did.

Q. Is there any distinction between "the line of definite location" and "the line upon which the road is actually built or to be built?"

A. There is, particularly in regard to land-grant roads, as a definite location is a record required to be filed, showing the line of proposed road to be constructed. Construction location is a modification or elaboration of the definite location placed on the ground on the line of definite location when practicable, or contiguous thereto, with all the detail of curvature, grade, stakes, side stakes and slope stakes placed in their proper position for the guidance of parties about to commence construction.

40 That upon consideration of the same when offered and introduced, the defendant made objection thereto on the ground of same being incompetent, irrelevant and immaterial; that said objection was sustained by the court, to which said ruling of

said court holding said evidence to be immaterial, incompetent and irrelevant, said defendant then and there excepted, which said exception was allowed by the court.

That by virtue of the provisions of the stipulation it was agreed between the parties in interest that subject to the plaintiff's objection and exception as to the competency, materiality and relevancy thereof, it was and is a fact that a certain action was theretofore commenced and prosecuted in the district court of the third judicial district within and for the Territory of Dakota, in the county of Burleigh, in favor of the Northern Pacific Railroad Company and against James Browning and others, including the plaintiff herein defendant, and that exhibits marked "4," "5," "6," "7" and "8" attached to the stipulation hereinbefore referred to as having been filed in this cause, are true copies of the record of said proceedings; that said fact as so agreed upon and said exhibits as attached to said stipulation, having been offered and introduced upon the trial of said cause, as evidence on behalf of the defendant in pursuance of the agreement of said stipulation; upon consideration of same objection was made thereto as evidence by the plaintiff on the ground that same was incompetent, irrelevant and immaterial; which said objection was sustained by the court, to which ruling of the court holding said evidence to be incompetent, irrelevant and immaterial the defendant then and there excepted, which said exception was allowed by the court.

That said Exhibits "4," "5," "6," "7," and "8" as so attached to said stipulation and offered and introduced upon said trial are, by this reference thereto, made a part of and included in this bill of exceptions.

That by virtue of the provisions of said stipulation it was agreed as between the parties in interest, that the value of the use and occupation of the premises in question for six (6) years prior to December 28th, 1891, the date of the commencement of this action, is the sum of twenty-six thousand dollars (\$26,000) and that the value of the use and occupation of said premises, omitting that part thereof purporting to be affected by the proceedings set out in Exhibits "4," "5," "6," "7," and "8" is the sum of twenty-one thousand dollars (\$21,000.00.)

By virtue of the provisions of said stipulation filed as aforesaid, it was agreed as between the parties in interest, that the testimony of Montgomery Meigs, a witness produced by the defendant, 41 a copy of which, marked Exhibit "9," is attached to the stipulation hereinbefore referred to as having been filed in this cause should be considered as part of the evidence in this cause, subject to the objection and exception of the plaintiff as to the materiality, competency and relevancy thereof.

That in pursuance of said agreement of said stipulation said testimony of said Montgomery Meigs was offered and introduced as evidence in this cause on behalf of the defendant, and, as so offered and introduced was and is as follows, to wit:

MONTGOMERY MEIGS testified as follows :

Examination.

By Mr. F. M. DUDLEY :

Q. Will you state your name, age, occupation and place of residence ?

A. My name is Montgomery Meigs ; United States civil engineer, stationed at Keokuk, Iowa ; age 47.

Q. How long have you been a civil engineer ?

A. Since 1874, United States civil engineer—civil engineer since 1870.

Q. Where were you engaged in 1870, 1871, 1872, and 1873 ?

A. On the line of the Northern Pacific railroad.

Q. At what points ?

A. Between Brainerd and the Big Horn river—I was on those surveys.

Q. Are you familiar with the location of the Northern Pacific railroad at Bismarck, North Dakota, and between Bismarck and the Missouri river ?

A. Yes.

Q. Did you have charge of the location of the road at those points ?

A. Yes, I ran preliminary lines, and located the road from the second crossing of the Sheyenne river to Bismarck, and had charge of the construction of the line from a point fifty miles east of Bismarck to the Missouri river.

Q. Will you state at what points the said crossing of the Sheyenne appears on Exhibit "1" ?

A. It appears to be a point 60 miles west of Moorhead.

Q. How is it marked on the exhibit ?

A. "60 M."

Q. You located the road from there to the Missouri river ?

A. I located from the James river, but I ran preliminary lines from this point—from the 60-mile point.

Q. And you located the road from the James river to the Missouri river ?

42 A. Yes, and constructed the last fifty miles of it, ending at Bismarck.

Q. Will you state the character of the country in township 138 north of range 80 west, 5th principal meridian, traversed by the line of the Northern Pacific as located ?

A. You mean as located ?

Q. As located—not as constructed, but as located.

A. Well, there were two locations, there was one into Bismarck, called "Edwinton" on this Exhibit "A" (witness refers to exhibit), and one ending in section 17.

Q. Will you state when these locations were made ?

A. In the spring of 1872, as I recollect. I started my surveys under great pressure, I was told to start a line and run it east, and locate as fast as possible, because there was an army of contractors



coming and it was necessary that they should have something to go to work on, and I used to run my preliminary line one day and go back and locate the next, very often without knowing whether I was going to get out or not—the original start may have been here (indicating on map), though I think it was further up Apple creek. My impression is that this line was run in the spring of 1873.

Q. This line you refer to is the line running into section 17, on Exhibit "A"?

A. Yes, the lower line. As I say, my memory about the sequence of these things—21 years ago—is somewhat indistinct.

Q. This line, the lower line of location, going into section 17, and shown on Exhibit "A," is substantially the same line, is it not, as that shown as the line of definite location on Exhibit "1"?

A. Yes.

Q. Was the road, as finally constructed, constructed on this line?

A. No, it was not.

Q. What, if any, work was done on that line of definite location?

A. A little grading was done—the contractors began work on this grading, as I recollect, and after a little work had been done orders were given for it to be discontinued.

Q. These orders were given by whom?

A. I think they were from headquarters—I could not say exactly but I think from Colonel Gaw, who was my immediate chief.

Q. And these orders were given to you, and by you given to the contractors?

A. Yes, they were.

43 Q. What was the nature of the country through which, or over which, this line of definite location extended?

A. The latter part of it, near the river, ran for two miles or more across the Missouri River bottom, though the southeast corner of section 9, the northwest corner of section 16 and section 17, as shown on "Exhibit A."

Q. That portion was through the Missouri River bottom?

A. Through the Missouri River bottom.

Q. Will you state what the nature of the land, and condition of the bottom is, through there?

A. The bottom is very low, and overflowed at high water—sometimes they have very high water.

Q. What evidence of overflows, if any, was there there?

A. There was on the terrace which bordered the bottoms a well-defined high-water mark of uncertain age, but distinctly to be seen, high above the bottom.

Q. And what, if any, grade would have been required in order to have constructed the road over this bottom, along the line of definite location?

A. My first orders were to put the grade, I think it was, 10 feet above high-water mark, and I so staked it out.

Q. That would make the grade how much?

A. That would leave the grade 24 feet high, if the mark was 14 feet up the bank, and it was at least that high.

Q. You state these were your first orders—were they changed?

A. I, very soon after sending my plat in, received orders to reduce the grade to a merely nominal one, sufficient to make a good road-bed without providing for overflow at all.

Q. When was that line abandoned?

A. I think before any but very little work had been done on it.

Q. And where was the line then located?

A. (Witness refers to "Exhibit 2.") The line by this new location was diverted through sections 1, 3, and 4, into the south edge of Edwinton.

Q. At what point did it diverge from the old location by the map?

A. I should say it diverged somewhere in the northern half of section 12.

Q. And what was the nature of the road-bed from this point of divergence to Bismarck, over which the constructed road runs?

A. It is high ground, of usual rolling character.

Q. Would any part of that line be overflowed by the Missouri river?

A. It is above high water.

44 Q. How far to the west did you have charge of this construction—simply to Bismarck?

A. Simply to the town of Bismarck—the track was laid into the bottoms, from Bismarck, after I had left on the first Stanley expedition.

Q. Had the road been located west of Bismarck at the time you left, that is, any portion of the grading done?

A. No, sir; you mean west of the river, or west of Bismarck?

Q. West of Bismarck?

A. I think I laid out a grade with a curve descending to the steamboat landing about a mile from the town, to the westward, towards the river.

Q. And what was the level of that line?

A. That descended to the low bottom, which was overflowed at high water.

Q. I will call your attention to "Exhibit 2," and to the line starting from the east edge of section 5, descending with a curve into the river bottom, extending about three-quarters of a mile along the river bank to a point marked Sta. 10371 x 40, and will ask you, first, if that curved line shows about substantially the line located by you extending westward from Bismarck, and, if so, does it show all the line as located by you, and if it shows more than all the line located by you, what portion of that line would show the line as located by yourself?

A. That line is, it seems to me, the same line that was contemplated when I left work to go on the Stanley expedition. I cannot say that I located this, but it was contemplated, and as I understand, constructed by my successor.

By Mr. H. F. STEVENS:

Q. You had been across the river, hadn't you?

A. Yes.

Q. And the line on the other side, as contemplated, struck about the same level, didn't it?

A. The only line we had on the other side was the line we had down here (indicating on map). The bottoms on the opposite side of the river are substantially the same, excepting they are timbered, as they are on the east side, and for some distance.

By Mr. DUDLEY :

Q. At what point on this "Exhibit 2" does the line west of Bismarck leave the high ground and descend to the river bottoms?

A. A short distance east of the 195th mile.

Q. How is the 195th mile indicated on the map, "Exhibit 2?"

A. "195 M." about three inches west of the plat of Bismarck.

45 By Mr. J. H. MITCHELL, JR. :

Q. Was the line, as constructed by you, carried to the western limits of Bismarck?

A. Well, Bismarck consisted of but few houses in those days. The line ended at the edge of the bluff, or within a block of the edge of the bluff, or terrace, on which the town stood—about one inch, on "Exhibit 2," east of the west line of section 4. When I was there we had not built down the bluff at all; it was done very soon afterwards, I think.

Q. What was the character of the work that you did beyond the point where your construction ended at that time?

A. None.

Q. Well, I mean as to location of line.

A. What was the end of it?

Q. Yes.

A. Well, I cannot say that I located that line, positively, I do not remember, but the line before mentioned, as shown on "Exhibit 2" agrees with what had been ordered done when I left.

Q. If you had carried the construction of the road across on the line as definitely located, what would have been the height of the banks?

A. My recollection is that the grades on my profile sent to headquarters provided for a high embankment.

Q. What was the height of your embankment, as required for construction, and as actually made for construction, through Bismarck?

A. Merely nominal—enough to bed the ties.

Q. Well, was that about the condition from the point of divergence of the constructed line from the located line, clear up to Bismarck?

A. Pretty much so—there was no difficulty whatever to be surmounted by that line.

Q. What would have been the required width of base line for the accommodation of a bank 40 feet high on this line of definite location?

A. A railroad embankment 40 feet high of usual proportions and slopes, would be nearly 140 feet wide at the bottom.

Q. Can you give just a rough estimate of the difference in cost of construction of these two lines—the line as definitely located and the line as actually constructed—considering the difference in grades from the point of divergence to the point where you constructed it in Bismarck, and to a point equally distant on the line of definite location from the point of divergence?

A. I should say the line as originally located would have cost more than the line actually constructed, by about the difference between a mile of embankment 2 feet high and a mile of embankment 40 or 14 feet high as the case may be.

By Mr. DUDLEY:

Q. You state that the line of definite location extends across the river bottoms, which are overflowed?

A. Yes.

Q. Would it be practicable to build a road across that bottom so that it would not be washed out, and to keep it above the high-water mark?

A. It would be enormously expensive.

Q. As an engineer, which do you consider the most eligible route, the one upon which the line was constructed, or the one shown upon the map of definite location?

A. The one upon which the line was constructed.

Q. Would it not be almost impossible to construct a road along the line of definite location, so that it would not be washed out by extreme high water?

A. Not impossible, but extremely expensive.

Q. Would there not always be danger of a grade across that bottom being washed out?

A. Always.

By Mr. MITCHELL:

Q. Would it be a practicable line, from an engineering standpoint?

A. I hardly think so, unless some great advantage was to be gained by it.

Cross-examination.

By Mr. H. F. STEVENS:

Q. As I understand you, this is largely a matter of recollection with you?

A. Very much so.

Q. And independent recollection—have you refreshed your recollection by any recent data?

A. The only records I have are some private letters written home during my connection with the Northern Pacific Railroad Company, and some sketches of the country made at that time, which, however, do not shed much light on this subject.

Q. I will ask you to read the question and answer, in the testimony of C. A. F. Morris, in this case, as follows:

"Q. Now, describe the survey of definite location of the line, as contradistinguished from the construction survey."

Please read the answer following this, and state whether that is a correct statement of what was done with respect to the definite location of the Northern Pacific railroad, as testified to by you?

47 A. I think it is. Mr. Morris seems to have described very accurately the usual processes in railroad surveys for construction. It is, however, customary to change the line in places where experience, gained before the construction actually begins, shows that an improvement can be made, and this is often done.

That upon consideration of the same when offered and introduced, the plaintiff made objection thereto on the ground that same was incompetent, irrelevant and immaterial; that said objection was sustained by the court, to which said ruling of the court holding said evidence to be immaterial, incompetent and irrelevant, said defendant then and there excepted, which said exception was allowed by the court.

That by virtue of the provisions of said stipulation, filed as aforesaid, it was agreed between the parties in interest that upon the facts and evidence therein stipulated and hereinbefore set forth and subject to the terms of said stipulation above referred to, judgment should be entered as of the adjourned April, 1893, term of said court.

That said court having considered said facts and evidence as so stipulated and agreed upon by the parties, and as submitted upon the trial of said cause by virtue of the agreements of said stipulation, did upon the 16th day of March, A. D. 1894, make findings of fact and conclusions of law, and upon the making of said findings of fact and conclusions of law, the defendant, by its counsel, the counsel for plaintiff being present, thereupon requested the court to make some finding of fact based upon the testimony of Charles A. F. Morris, and of Montgomery Meigs, witnesses on behalf of defendant, as to the line as designated on the map of definite location of a line of railroad as generally filed, or as required to be filed, under the various congressional railroad land grant acts, not being the line as finally located for purposes of construction, and that it is frequently necessary in construction of a line of railroad to vary from the line as designated upon the map of definite location as filed and that the term "definite location" as used in respect to the requirements for making or filing maps showing the line of location, does not include within its meaning final location as required for purposes of construction; which request for some finding of fact based upon said testimony was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth the defendant, by its counsel, excepted, which said exception was allowed.

And the defendant then and there requested the court to find, as

one of the facts in this cause, that the line as designated on  
48 the map of definite location of a line of railroad as generally made or filed, or as required to be made or filed under the various congressional railroad land grant acts, is not the line as finally located for purposes of construction, and that it is frequently necessary in construction of a line of railroad to vary from the line as designated upon the map of definite location as filed, and that the term "definite location" as used in respect to the requirements for making or filing maps showing the line of location, does not include within its meaning final location as required for purposes of construction, which request for finding of fact was refused by the court, to which refusal of the court to make said finding defendant, by its counsel, excepted, which exception was allowed.

And the defendant, further, by its counsel, requested the court that some finding of fact should be made by the court, based upon the testimony of Montgomery Meigs, a witness on behalf of the defendant, as to the necessity for the variations from the line as designated on the map of definite location, as filed by the defendant to the line as finally constructed and now in operation over the premises involved in this action, and as to the line as designated upon said map being impracticable for purposes of safe or economical operation, which said request for some finding of fact based upon said testimony was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth, the defendant, by its counsel, excepted, which said exception was allowed.

And the defendant then and there requested the court to find as one of the facts in this cause, that the line as designated on the map of definite location as filed by the defendant was not a line practicable for purposes of safe or economical operation, and that it became necessary in constructing the road of the defendant on the approach of the same from the east to the Missouri river, and (thre') the township in which the premises in question are situated, to vary from the line as designated on the map of definite location as filed, to the line as constructed through the premises in question, in order to obtain a line or route practicable for safe and economical operation, which said request for said finding of fact was refused by the court, to which said refusal of the court to make said find-, defendant, by its counsel, excepted, which said exception was allowed.

And the defendant then and there, by its counsel, further requested the court that some finding should be made by the court,  
based upon the evidence submitted by agreement of the  
49 parties under the terms of the stipulation hereinbefore referred to as having been filed in said cause, to the effect that after the road was constructed commissioners were duly appointed by the President, under the provisions of section four (4) of the act of incorporation of the defendant company, to examine and report thereon, and that they performed their duty and duly reported, which report was forwarded to the President by the Secretary of the



Interior, under date of November 28, A. D. 1873, and was approved by the President under date of December 1, A. D. 1873, as shown by the papers and map accompanying said report, copies of which were attached to the stipulation hereinbefore referred to as having been filed in said cause, and for some finding of fact upon the question raised upon said examination and report, and its approval as aforesaid, as to whether, by virtue of said examination and report, and its acceptance and approval, the portion of the railroad constructed across the premises in question was accepted as a part of the main line of the Northern Pacific railroad, as authorized to be constructed by virtue of the provisions of the charter granted the defendant company by Congress, and as having been constructed in all respects in accordance with the terms of the provisions and requirements of said charter; which said request for some finding of fact based upon said testimony was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth, the defendant, by its counsel, then and there excepted, which said exception was allowed.

And the defendant, by its counsel, then and there requested the court to find, as one of the facts in this cause, that after the road was constructed commissioners were duly appointed by the President, under the provisions of section four (4) of the act of incorporation of the defendant company, to examine and report thereon; that they performed their duty and duly reported, which report was forwarded to the President by the Secretary of the Interior, under date of November 28th, 1873, and was approved by the President under date of December 1st, 1873; that the portion of railroad constructed over the premises in question, was by virtue of said examination and report and the approval and acceptance thereof, duly accepted as a part of the main line of the Northern Pacific railroad, authorized to be constructed by the charter granted to said defendant company by Congress, and was thereby duly accepted as having been, in all respects, constructed as required by the terms, provisions and requirements of said charter; which said request for said finding of fact was then and there refused by the court, to which  
50 refusal to make said finding, defendant, by its counsel, then and there excepted, which said exception was allowed.

That among the findings of fact hereinbefore referred to as having been made in said court was the following: "That the value of the use and occupation of the premises in question for six years prior to December 28th, 1891, the date of the commencement of the action, is the sum of twenty-six thousand dollars;" that upon said finding of fact having been made by the court, the defendant, by its counsel, then and there excepted to the same, which said exception was allowed by the court.

That defendant, by its counsel, then and there requested the court to find, as a fact in said cause, that the value of the use and occupation of the premises in question, for six years prior to December 28th, 1891, the date of the commencement of the action, is the sum of twenty-one thousand dollars, which said request for said finding of fact was refused by the court, to which refusal of the court to

make said finding, defendant, by its counsel, then and there excepted, which said exception was allowed.

That the conclusions of law as found by the court were as follows:

"That the plaintiff is entitled to the possession of the premises described in the complaint, and referred to in the findings of fact, and to recover from the defendant the sum of twenty-six thousand dollars, with interest thereon from the 28th day of December, A. D. 1891, at the rate of seven (7) per centum per annum, and his costs and disbursements."

That upon the making of said conclusions of law, the defendant then and there, by its counsel, excepted to the same, which said exception was allowed by the court.

And the defendant, further, by its counsel, requested the court to make some findings of fact based upon the evidence as agreed upon by the provisions of said stipulation and offered and introduced in evidence in pursuance thereof, to the effect that after the road was constructed, commissioners were duly appointed by the President, under the provisions of section four (4) of the act of incorporation of the defendant company, to examine and report thereon; that they performed their duty and duly reported; that their report was forwarded to the President by the Secretary of the Interior, under date of November 28th, 1873, and was approved by the President under date of December 1st, 1873; and that by virtue of said report

51 and the approval thereof, said portion of road constructed and now operated across the premises in question in this case, was accepted as a part of the main line of the Northern Pacific railroad authorized by the charter granted by Congress to said company, and as having been constructed in accordance with the terms, provisions and requirements thereof. Which said request for some finding of fact based upon said evidence was refused by the court, to which refusal to make any finding on the subject referred to in said request as above set forth, the defendant, by its counsel, excepts, which said exception is allowed.

And the defendant then and there requested the court to find, as one of the facts in this cause, that after the road was constructed, commissioners were duly appointed by the President, under the provisions of section four (4) of the act of incorporation of the defendant company, to examine and report thereon; that they performed their duty and duly reported; that their report was forwarded to the President by the Secretary of the Interior under date of November 28, 1873; and was approved by the President under date of December 1st, 1873.

By virtue of said report and approval thereof, said portion of road constructed and now operated across the premises in question in this cause, was accepted as a part of the main line of the Northern Pacific railroad, authorized by the charter granted by Congress to said company as having been constructed in accordance with the terms, provisions and requirements thereof.

Which said request for said finding of fact is refused by the court,

to which said refusal of the court to make said finding the defendant, by its counsel, excepts, which said exception is allowed.

And the finding having been made by the court as hereinbefore set forth, that the value of the use and occupation of the premises in question for six (6) years prior to December 28th, 1891, the date of the commencement of this action, was the sum of twenty-six thousand dollars (\$26,000.00), the defendant, by its counsel, at the time of making of said finding did then and there except to the making of the same, which said exception is allowed.

And the defendant, by its counsel, then and there requested the court to find that the value of the use and occupation of the premises in question for six years prior to December 28th, 1891, the date of the commencement of this action, was the sum of twenty-one thousand dollars (\$21,000.00), which said request for said finding of fact was refused by the court, to which said refusal of the  
52 court, to make said finding, the defendant, by its counsel, then and there excepted, which said exception was allowed.

That upon the making and finding as conclusions of law, as hereinbefore set forth, that the plaintiff is entitled to the possession of the premises described in the complaint and referred to in the findings of fact, and to recover from the defendant the sum of twenty-six thousand dollars (\$26,000.00), with interest thereon from the twenty-eighth day of December, A. D. 1891, at the rate of seven per centum per annum, and his costs and disbursements the defendant, by its counsel, then and there excepted to said conclusion of law as so made and found, which said exception is allowed.

That thereupon, on the said sixteenth day of March, 1894, judgment was entered in accordance with the order made by the court in furtherance and in pursuance of the conclusions of law made by the court as aforesaid.

And there is further made a part of this bill of exceptions the agreement of the parties in interest, by their respective counsel now present and consenting thereto, that any and all of the exhibits attached to the stipulation hereinbefore referred to as having been filed in this cause, copies of which are not made a part of this bill of exceptions, other than by reference, may be used and referred to by either party, in all proceedings that may be had in this cause, or upon any hearing of same upon any writ of error from the circuit court of appeals of the eighth circuit, to the above-entitled court or from the Supreme Court of the United States to the circuit court of appeals for the eighth circuit, in their original form as attached to said stipulation, or in the form of true and correct copies made therefrom.

UNITED STATES OF AMERICA,  
*District of North Dakota, Southwestern Division,* } ss.

I, Alfred D. Thomas, United States district judge for the district of North Dakota, do hereby certify that the foregoing having been examined by me is found to be conformable to the truth and contains all the evidence given upon the trial of said action (except

such of the exhibits attached to the stipulation of facts filed in said cause, to which reference only is made in the foregoing), together with all objections to the evidence; the rulings thereon, and the exceptions thereto, taken, as well as the proceedings and motions made and entered on said trial and the rulings thereon and exceptions thereto and forasmuch as none of the matters aforesaid appear of record in said cause, I have, at the request of defendant's attorney, counsel for the plaintiff being present and consenting thereto, settled, signed, sealed and allowed the foregoing as and for the bill of exceptions in this cause this sixteenth day of March, 1894, within the term at which said cause was tried and within the time allowed by law and the rules of court for settling and allowance of the same.

ALFRED D. THOMAS,

*United States District Judge for the District of North Dakota.*

Upon the back of said bill of exceptions appear indorsements in words and figures following, to wit:

U. S. circuit court, district of North Dakota, southwestern division. Patrick R. Smith, def't in error, *vs.* Northern Pacific R. R. Co., pl'ff in error. Bill of exceptions. Filed March 16, 1894. J. A. Montgomery, clerk. F. M. Dudley & J. H. Mitchell, Jr., attorneys for defendant, St. Paul, Minn.

Thereupon, afterwards, to wit, on the 15th day of September, A. D. 1894, a stipulation was filed in said cause, which said stipulation was and is in words and figures following, to wit:

United States Circuit Court, District of North Dakota, Southwestern Division.

PATRICK R. SMITH, Plaintiff,

*vs.*

NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

In the above-entitled cause it is stipulated that any and all of the exhibits attached to the stipulation referred to in the bill of exceptions as having been filed in this cause, copies of which are not made a part of said bill of exceptions, other than by reference, may be used, read and referred to by either party in all proceedings that may be had in this cause or upon any hearing of same upon any writ of error from the circuit court of appeals of the eighth circuit, to the above-entitled court, or from the Supreme Court of the United States to the circuit court of appeals for the eighth circuit, in their original form as attached to said stipulation, or in the form of true and correct copies made therefrom.

Dated at St. Paul, Sept. 14, 1894.

STEVENS, O'BRIEN & GLENN,

*Attorneys for Plaintiff.*

F. M. DUDLEY & J. H. MITCHELL, JR.,

*Attorneys for Defendant.*

Upon the back of said stipulation appear indorsements in words and figures following, to wit:

54 U. S. circuit court, district of North Dakota, southwestern division. Patrick R. Smith *vs.* Northern Pacific R. R. Co. Stipulation. Filed Sept. 15, 1894. J. A. Montgomery, clerk.

Thereupon, afterwards, to wit, assignment of errors was filed in said court, which said assignment of errors is in words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, }  
*vs.*  
 PATRICK R. SMITH, Defendant in Error. }

*Assignment of Errors.*

In the following-entitled action:

United States Circuit Court, District of North Dakota, Southwestern Division.

PATRICK R. SMITH, Plaintiff,  
*vs.*  
 NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

And now comes the said plaintiff in error, The Northern Pacific Railroad Company, which was the defendant in the above-entitled action in said circuit court, by F. M. Dudley and J. H. Mitchell, Jr., its attorneys, and says that in the record and proceedings in the above-entitled action in said court there is manifest error, in this, to wit:

First.

That the court erred in refusing to admit as evidence on behalf of the plaintiff in error, the fact, as stipulated and agreed upon by the parties plaintiff and defendant, that after the road was constructed commissioners were duly appointed by the President under the provisions of section 4 of the act of incorporation of the defendant company, to examine and report thereon; that they performed their duties and duly reported, which report was forwarded to the President by the Secretary of the Interior under date of November 28, 1873, and was approved by the President under date of December 1st, 1873, and in sustaining the objection of the defendant in error to the admission of said fact as evidence, on the ground of same being incompetent, irrelevant and immaterial.

That the court erred in refusing to admit as evidence on behalf of the plaintiff in error, the true and authenticated copy of said commissioner's report, together with the accompanying papers and the certain map thereto attached and therein referred to as "Exhibit C," all of which was, for identification, marked "Exhibit 2," of the record in this case. And said court erred in

sustaining the objection of the defendant in error to said report, map and accompanying papers, on the ground of the same being incompetent, irrelevant and immaterial.

### Second.

That the court erred in admitting in evidence Exhibit- "B" and "C," offered on behalf of defendant in error, said exhibits being respectively as follows:

Exhibit "B" map certified by S. M. Stockslager, Commissioner of the General Land Office, under date of April 27th, 1889, purporting to be a copy of a portion of the map of definite location of the Northern Pacific railroad, east of the Missouri river, a distance of 24 miles, and to a point west of said river, a distance of about six miles.

Exhibit "C." A map, certified by Thomas H. Carter, Commissioner of the General Land Office, under date of March 17th, 1892, purporting to be a copy of a diagram showing the general route of the Northern Pacific main line, the map of which was accepted by the Secretary of the Interior, February 21st, 1872, and the definite location of the Northern Pacific railroad through townships in ranges 77, 78, 79, 80 and 81, west, in North Dakota, where said road crosses the Missouri river.

The court having erred in overruling the objection of the plaintiff in error to said evidence, on the ground that the said maps were not the best evidence of the map of definite location filed by the defendant in the office of the Commissioner of the General Land Office.

### Third.

That the court erred in refusing to admit as evidence on behalf of the plaintiff in error the testimony of Charles A. F. Morris, a civil engineer, in the case of *The St. Paul & Pacific Railroad Company et al.* against *The Northern Pacific Railroad Company*, as contained in the printed transcript of record of cause No. 344 on the docket of the Supreme Court of the United States, October term, 1889, and agreed upon stipulation of the parties to this action as testimony to be offered on behalf of plaintiff in error, subject to objection and exception of plaintiff as to materiality, competency and relevancy thereof, a copy of which said testimony, as the same appears of record in this action, is marked for identification, Defendant's Exhibit 3, said testimony being to the effect that the line as designated on the map of definite location of a line of railroad, as generally filed, or as required to be filed, under the various congressional railroad land-grant acts, was not the line as finally located for purposes of construction, and that it is frequently necessary, in construction of a line of railroad, to vary from the line as designated upon the map of definite location as filed, and that the term "definite location," as used in respect to the requirements for making or filing maps showing the line of location, does not include within its meaning final location as required for purposes of construction.



That the court erred in sustaining the objection of defendant in error to the admission of said testimony as evidence, on the ground of the same being irrelevant, incompetent and immaterial.

#### Fourth.

That the court erred in refusing to admit as evidence on behalf of the plaintiff in error, the fact, agreed upon by stipulation of the parties plaintiff and defendant, that a certain action was theretofore commenced and prosecuted in the district court, third judicial district, within and for the Territory of Dakota, in the county of Burleigh, in favor of the Northern Pacific Railroad Company and against James Brown, and others, including the plaintiff, defendant in error, herein, as defendants—and refusing to admit as evidence on behalf of the plaintiff in error the certain true and certified copies of the records of said proceedings, which, for purposes of identification, were marked "Defendant's Exhibits 4, 5, 6, 7, and 8" said exhibits being respectively as follows:

Exhibit 4. Summons in said action, served September 3rd, 1877.

Exhibit 5. The complaint in said action—the same being for the possession of a tract of land in the city of Bismarck, in said county of Burleigh, described as follows: "Commencing at the corner of Main and Third streets, in the city of Bismarck, and running south along the east line of Third street seventy-five feet; thence east fifty feet; thence north to the south line of Main street, thence west, on the south line of Main street, to the place of beginning," and for the sum of five hundred dollars for the plaintiff's damages for the withholding of the same, and costs; which complaint was filed in the office of the clerk of said court on the 1st day of September, 1877.

Exhibit 6. Being the demurrer of the defendant, Patrick R. Smith, to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action, in that it did not appear that the plaintiff was entitled to possession of the premises described in the complaint, which demurrer was dated November 17th, 1877.

57 Exhibit 7. Notice of application for judgment in favor of the plaintiff in said action, on the demurrer therein as frivolous which was dated January 30th, 1878.

Exhibit 8. Being an order for judgment in said action in favor of the plaintiff for the possession of the real estate described in the complaint, Exhibit 5, and for six cents damages for the withholding of the possession thereof, and fifteen dollars costs, which order for judgment was dated January 31st, 1878, and filed in the office of the clerk of said court, January 31st, 1878.

That the court erred in sustaining the objection of the defendant in error to the admission of said fact as agreed upon, in evidence, and to the said several exhibits hereinbefore referred to as evidence thereof, on the ground that the same were incompetent, irrelevant and immaterial.



## Fifth.

That the court erred in refusing to admit as evidence on behalf of the plaintiff in error the testimony of Montgomery Meigs, a civil engineer, a witness produced by the defendant, and agreed upon by stipulation of the parties to be as contained in the copy thereof marked, for the purposes of identification, as Defendant's Exhibit 9, which said testimony was to the effect that the variations from the line of road as designated on the map of definite location, as filed by the defendant, the plaintiff in error herein, to the line as finally constructed and now in operation over the premises involved in this action, were necessary, and that the line as designated upon the map of definite location as filed was impracticable for the purpose of safe and (economical) operation.

That the court erred in sustaining the objection of the defendant in error to the admission of said testimony, on the ground of same being incompetent, irrelevant and immaterial.

## Sixth.

That the court erred in refusing to make any finding of fact based upon the testimony of Charles A. F. Morris, and of Montgomery Meigs, as to the line as designated on the map of definite location of a railroad, as generally filed, under the various congressional railroad land grant acts, being the line as finally located for the purposes of construction, and that it is frequently necessary, in the construction of a line of railroad, to vary from the line as designated upon the map of definite location as filed, and that  
58 the term "definite location" as used in respect to the requirements for making or filing maps showing the line of location, does not include within its meaning final location as required for purposes of construction.

That the court erred in refusing to find, as one of the facts in said cause, as requested by the plaintiff in error, that the line as designated upon the map of definite location of a railroad, as generally made or filed, or as required to be made or filed, under the various congressional railroad land grant acts, is not the line as finally located for purposes of construction, and that it is frequently necessary, in the construction of a line of railroad, to vary from the line designated upon the map of definite location as filed, and that the term "definite location" was used in respect to the requirements for making or filing maps showing the line of location, does not include within its meaning final location as required for purposes of construction.

## Seventh.

That the court erred in refusing to make any finding of fact based upon the testimony of Montgomery Meigs, witness on behalf of the plaintiff in error, as to the necessity for the variations from the line as designated on the map of definite location, as filed by the defendant, to the line as finally constructed and now in operation over the premises involved in this action, and as to the line as desig-

nated upon the map being impracticable for purposes of safe or economical operation.

That the court erred in refusing to find, as a fact in said cause, as requested by the plaintiff in error, that the line as designated on the map of definite location as filed by the defendant, plaintiff in error herein, was not a line practicable for purposes of safe or economical operation, and that it became necessary in constructing the road of the defendant and the approach of the same from the east to the Missouri river, and through the township in which the premises in question are situated, to vary from the line as designated on the map of definite location as filed, to the line as constructed through the premises in question, in order to obtain a line or route practicable for safe and economical operation.

That the court erred in refusing to make any finding of fact, based upon the evidence submitted by agreement of the parties under the terms of the stipulation filed in said cause, to the effect that after the road was constructed commissioners were duly appointed by the President, under the provisions of section 4 of the act of incorporation of the defendant company, to examine and report thereon, and that they performed their duties and duly reported, which report was forwarded to the President by the Secretary of the Interior, under date of November 28th, 59 A. D. 1873, and was approved by the President under date of December 1st, 1873, as shown by the papers and map accompanying said report, hereinbefore referred to.

And the court erred in refusing to make any finding of fact upon the question raised upon said examination and report, and its approval, as aforesaid, as to whether, by virtue of said examination and report, and its acceptance and approval, the portion of the railroad constructed across the premises in question was accepted as a part of the main line of the Northern Pacific railroad, as authorized to be constructed by virtue of the provisions of the charter granted the defendant company by Congress, and as having been constructed in all respects in accordance with the terms and provisions and requirements of said charter.

#### Eighth.

That the court erred in refusing to find, as one of the facts in said cause, as requested by plaintiff in error, that after the road was constructed commissioners were duly appointed by the President, under the provisions of section 4 of the act of incorporation of the defendant company, to examine and report thereon, and that they performed their duty and duly reported, which report was forwarded to the President by the Secretary of the Interior, under date of November 28th, 1873, and was approved by the President under date of December 1st, 1873, that the portion of railroad constructed over the premises in question was, by virtue of said examination and report, and the approval and acceptance thereof, duly accepted as a part of the main line of the Northern Pacific railroad, authorized to be constructed by the charter granted the said defendant com-

pany by Congress, and was thereby duly accepted as having been in all respects constructed as required by the terms, provisions and requirements of said charter.

#### Ninth.

That the court erred in finding, as one of the facts in said cause, that the value of the use and occupation of the premises in question for six years prior to December 28th, 1891, the date of the commencement of said action, was the sum of twenty-six thousand dollars (\$26,000.00).

#### Tenth.

That the court erred in refusing to find, as one of the facts in said cause, as requested by the plaintiff in error, that the value  
60 of the use and occupation of the premises in question for six years prior to December 28th, 1891, the date of the commencement of the action, was the sum of twenty-one thousand dollars (\$21,000.00).

#### Eleventh.

That the court erred in (find-), as a conclusion of law in said cause, that the plaintiff, defendant in error herein, is entitled to the possession of the premises described in the complaint, and referred to in the findings of fact, and in finding, as a conclusion of law, that the plaintiff is entitled to recover from the defendant the sum of twenty-six thousand dollars (\$26,000.00) with interest thereon from the 28th day of December, A. D. 1891, at the rate of seven (7) per cent. per annum, and his costs and disbursements.

#### Twelfth.

That the court erred in rendering judgment in favor of the plaintiff, the defendant in error, against the defendant, the plaintiff in error, as was done under date of March 16th, 1894, to the effect that the plaintiff is, and ever since a period anterior to the 28th day of December, A. D. 1885, has been, the owner in fee-simple and entitled to the possession of that certain real property described in the complaint, and further known and described as lots 5, 6, 7, 8, 9, 10, 11 and 12, all inclusive in block 8, city of Bismarck, formerly known as Edwinton, according to the plat thereof on file and of record in the office of the register of deeds of the county of Burleigh, State of North Dakota, and that defendant, plaintiff in error, has wrongfully and unlawfully withheld the possession thereof from said plaintiff, defendant in error, for a period of six years prior to the 28th day of December, A. D. 1891.

And the court erred in adjudging and determining, by such judgment as was made and rendered, that said plaintiff, defendant in error, was entitled to recover from said defendant, plaintiff in error, the sum of thirty thousand and twenty-four dollars and twenty-one cents (\$30,024.21) as damages for the withholding of said property, together with the sum of seventy-five and  $\frac{7}{100}$  dollars (\$75.77) his costs and disbursements.

## Thirteenth.

That the court erred in not rendering judgment in favor of the defendant, plaintiff in error, against the plaintiff, defendant in error, and in not adjudging and determining that the defendant, plaintiff in error, is, and was at all times mentioned in the complaint, the owner in fee-simple and entitled to the possession of said premises, and that said defendant, plaintiff in error, was and is entitled  
 61 to recover from said plaintiff, defendant in error, its costs and disbursements in said action.

Wherefore, the said Northern Pacific Railroad Company, plaintiff in error, prays that the judgment of said circuit court of the United States for the district of North Dakota, southwestern division, may be reversed, and that such further matters be done therein as of right and according to the laws and customs of the United States should be done.

F. M. DUDLEY &  
 J. H. MITCHELL, JR.,  
*Attorneys for Plaintiff in Error.*

Dated this 14th day of September, A. D. 1894.

Upon the back of said assignment of errors, appear indorsements in words and figures following, to wit:

U. S. circuit court of appeals, 8th circuit. Northern Pacific Railroad Co., plaintiff in error, *vs.* Patrick R. Smith, defendant in error. Assignment of errors. Filed Sept. 15, 1894. J. A. Montgomery, clerk. F. M. Dudley and J. H. Mitchell, Jr., att'ys for pl'ff in error, St. Paul, Minn.

Thereupon afterwards, to wit, on the said 15th day of September, a petition for writ of error was filed in said case, which said petition for writ of error is in words and figures following, to wit:

United States Circuit Court, District of North Dakota, Southwestern Division.

PATRICK R. SMITH, Plaintiff,  
*vs.*  
 NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

To the honorable judges of the United States circuit court of appeals for the eighth circuit:

Your petitioner, The Northern Pacific Railroad Company, the plaintiff in error in the above-entitled action, respectfully shows that by the judgment heretofore rendered by said United States circuit court for the district of North Dakota, southwestern division, in the above-entitled cause, a manifest error hath happened to the great damage of your petitioner in this: that a great manifest error of law occurred at the trial of said cause against the objection of your petitioner and to its great damage, all of which will more fully appear by the record of said court in said case.

Wherefore your petitioner prays your honors to allow a writ of error from the United States circuit court of appeals for the eighth circuit, to be directed to said United States circuit court for the district of North Dakota, southwestern division, whereby under the seal of the said United States circuit court for the district of North Dakota, southwestern division, the record and proceedings aforesaid, with all things concerning the same may be transmitted to the United States circuit court of appeals, eighth circuit, with said writ of error, and that the record and proceedings aforesaid, being duly inspected, the said United States circuit court of appeals, eighth circuit, will cause further to be done therein and correct that error, what of right and according to the laws and customs of the United States, should be done.

Dated at St. Paul, September 14th, 1884.

F. M. DUDLEY &

J. H. MITCHELL, JR.,

*Attorneys for Petitioner.*

Upon the back of said petition for writ of error appear indorsements in words and figures following, to wit :

Original. U. S. circuit court, district of North Dakota, southwestern division. Patrick R. Smith, defendant in error, *vs.* Northern Pacific R. R. Co., pl'ff in error. Petition for writ of error. Filed Sept. 15", 1894. J. A. Montgomery, clerk. F. M. Dudley & J. H. Mitchell, Jr., attorneys for defendants, St. Paul, Minn.

Thereupon, afterwards, to wit, on the said 15" day of March, A. D. 1894, a writ of error was issued in said case, of which said writ of error the following is the original :

UNITED STATES OF AMERICA, ss :

The President of the United States of America to the honorable judges of the United States circuit court, district of North Dakota, southwestern division, Greeting :

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you at the adjourned April term, 1893, thereof, convened March 1st, 1894, between Patrick R. Smith and The Northern Pacific Railroad Company, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,

63 that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, within sixty days

from the date thereof, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15<sup>th</sup> day of September, in the year of our Lord, one thousand eight hundred and ninety-four. Issued at office in Fargo, North Dakota, with the seal of the circuit court aforesaid, and dated as aforesaid.

J. A. MONTGOMERY,

*Clerk of United States Circuit (Circuit) Court for the District of North Dakota, Southwestern Division.*

Allowed by—

WALTER H. SANBORN,

*United States Circuit Judge, Eighth Judicial Circuit.*

St. Paul, Sept. 14, 1894.

UNITED STATES OF AMERICA, {  
District of North Dakota, } ss :

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribed my name and affix the seal of the circuit court of the United States for the district of North Dakota, this 1<sup>st</sup> day of November, A. D. 1894.

J. A. MONTGOMERY,

*Clerk U. S. Circuit Court, District of North Dakota,*  
By H. G. EDWARDS,

*Deputy Clerk.*

64 United States circuit court of appeals, eighth circuit. Northern Pacific Railroad Co., plaintiff in error, vs. Patrick R. Smith. Writ of error. Filed Sept. 15, 1894. J. A. Montgomery, clerk. F. M. Dudley and J. H. Mitchell, Jr., att'y- for plaintiff in error.

Thereupon afterwards, to wit, on the said 15<sup>th</sup> day of September, A. D. 1894, a citation was issued in said case, of which said citation the following is the original:

United States of America to Patrick R. Smith, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this



citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of North Dakota, southwestern division, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, United States circuit judge for the eighth judicial circuit this 15<sup>th</sup> day of September, A. D. 1894.

WALTER H. SANBORN,  
*U. S. Circuit Judge, Eighth Circuit.*

United States circuit court of appeals, eighth circuit. Northern Pacific Railroad Company, plaintiff in error, *vs.* Patrick R. Smith. Citation. Due service at St. Paul, Minnesota, this 15th day of September, 1894, of the within citation is hereby admitted. Stevens, O'Brien & Glenn, att'ys for def't in error. F. M. Dudley & John H. Mitchell, att'ys for plaintiff in error. Filed Sept. 15, 1894. J. A. Montgomery, clerk.

Thereupon afterwards, to wit, on the said 15<sup>th</sup> day of March, 1894, a bond for costs was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents: that we, The Northern Pacific Railroad Company, by J. H. Mitchell, Jr., its attorney as principal, and J. W. Kendrick and M. P. Martin, of St. Paul, Minnesota, as sureties, are held and firmly bound unto Patrick R. Smith, in the full and just sum of five hundred dollars (\$500.00) to be paid to the said Patrick R. Smith, his heirs, executors, administrators, or  
65 assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this fourteenth day of September, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas, lately at the adjourned April 1893 term of the U. S. circuit court, district of North Dakota, southwestern division, convened March 1st, 1894, in a suit depending in said court between Patrick R. Smith, plaintiff, and Northern Pacific Railroad Company, defendant, judgment was rendered against the said defendant, and the said defendant has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Patrick R. Smith, citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said Northern Pacific Railroad Company shall prosecute said writ of error to effect, and answer all costs if it fail to make good its plea,



then the above obligation to be void, else to remain in full force and virtue.

NORTHERN PACIFIC RAILROAD  
COMPANY,

By J. H. MITCHELL, JR.  
J. W. KENDRICK.  
M. P. MARTIN.

In presence of—

JOHN G. DRESEN,  
G. H. CLURR.

STATE OF MINNESOTA, } ss:  
County of Ramsey, }

On this fourteenth day of September, A. D. 1894, personally came before me J. W. Kendrick and M. P. Martin, the same persons who signed and sealed the foregoing instrument, and each having been first duly sworn, did depose and say, that he is a resident and freeholder of this State, and worth the sum of one thousand dollars over and above his debts and liabilities, and property exempt from levy and sale under execution.

J. W. KENDRICK.  
M. P. MARTIN.

Subscribed and sworn to before me this fourteenth day of September, A. D. 1894.

[L. s.] JOHN G. DRESSEN,  
Notary Public, Ramsey County, Minnesota.

66 Upon the back of said bond appear indorsements in words and figures following to wit:

United States circuit court of appeals, eighth circuit. Northern Pacific Railroad Company, plaintiff in error, *vs.* Patrick R. Smith. Cost bond. The within bond and sufficiency of sureties thereon approved this 14th day of September, 1894. Walter H. Sanborn, U. S. circuit judge. F. M. Dudley and J. H. Mitchell, Jr., att'ys for plaintiff in error. Filed Sept. 15, 1894. J. A. Montgomery, clerk.

UNITED STATES OF AMERICA, } ss:  
District of North Dakota, }

I, J. A. Montgomery, clerk of the United States circuit court for the district of North Dakota, eighth circuit, do hereby certify that the foregoing pages from one to 84 contain true and faithful transcripts of all pleadings and proceedings of record and on file in my office as said clerk, and of the whole thereof, and the indorsements thereon, in the case of Patrick R. Smith *versus* The Northern Pacific Railroad Company.

Circuit Court of the United States, District of North Dakota.

Witness my hand and the seal of said circuit court, at Fargo, in said district, this 1<sup>st</sup> day of November, A. D. 1894.

J. A. MONTGOMERY, *Clerk*,  
By H. G. EDWARDS, *Deputy*.

Filed Nov. 8, 1894.

JOHN D. JORDAN, *Clerk*.

67 And on the sixteenth day of November, A. D. 1894, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following :

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in	} No. 556.
Error,	
<i>vs.</i>	
PATRICK R. SMITH.	

The clerk will enter my appearance as counsel for the plaintiff in error.

J. H. MITCHELL, JR.

Endorsed : " U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 556. Northern Pacific Railroad Co., pl'ff in error, *vs.* Patrick R. Smith. Appearance. Filed Nov. 16, 1894. John D. Jordan, clerk. J. H. Mitchell, Jr., counsel for pl'ff in error."

And on the twenty-first day of February, A. D. 1895, an appearance for defendant in error was filed in the clerk's office of said circuit court of appeals in the words and figures following :

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

THE NORTHERN PACIFIC R. R. Co., Plaintiff in Error,	} No. 556.
<i>vs.</i>	
PATRICK R. SMITH.	

The clerk will enter my appearance as counsel for the defendant in error.

H. F. STEVENS.

Endorsed : " U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 556. The Nor. Pac. R. R. Co., pl'ff in error, *vs.* Patrick R. Smith. Appearance. Filed Feb. 21, 1895. John D. Jordan, clerk. H. F. Stevens, St. Paul, Minn., counsel for def't in error."

And on the thirteenth day of May, A. D. 1895, an appearance of certain other counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term,  
1895.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in	}	No. 556.
Error,		
<i>vs.</i>		
PATRICK R. SMITH.		

The clerk will enter my appearance as counsel for the plaintiff in error.

CHARLES W. BUNN.  
F. W. M. CUTCHEON.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 556. Northern Pacific R. R. Co., plaintiff in error, *vs.* Patrick R. Smith. Appearance. Filed May 13, 1895. John D. Jordan, clerk. Charles W. Bunn and F. W. M. Cutcheon, counsel for plaintiff in error."

And on the thirteenth day of May, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term,  
1895.

MONDAY, *May* 13, 1895.

69	NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff	}	No. 556.
	in Error,		
	<i>vs.</i>		
	PATRICK R. SMITH, Defendant in Error.		

In error to the circuit court of the United States for the district of  
North Dakota.

This cause having been called for hearing in its regular order, the same was argued by Mr. F. W. M. Cutcheon and Mr. Charles W. Bunn in behalf of the plaintiff in error and by Mr. H. F. Stevens for the defendant in error. Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the nineteenth day of August, A. D. 1895, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

70 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1895.

<p>THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, <i>vs.</i> PATRICK R. SMITH, Defendant in Error.</p>	}	<p>No. 556. In Error to the Circuit Court of the United States for the District of North Dakota.</p>
--	---	--

Mr. C. W. Bunn and Mr. F. W. M. Cutcheon for plaintiff in error.  
Mr. H. F. Stevens for defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

SANBORN, J., delivered the opinion of the court:

This was an action brought by the defendant in error, Patrick R. Smith, against The Northern Pacific Railroad Company, the plaintiff in error, for the possession of certain lots in the city of Bismarck in the State of North Dakota, and for damages for withholding the same. It was tried by the court upon an agreed statement of facts and judgment was rendered for the defendant in error. This was the second trial of the case. On the first trial a judgment was rendered for the plaintiff in error, which was reversed in this court at the May term in 1893. In the opinion then rendered, which is reported in *Smith vs. Northern Pacific Railroad Company*, 58 Fed. Rep. 513, 7 C. C. A. 397, all the issues are stated and the views of this court upon all the alleged errors of law now assigned, except one, are expressed. We adhere to the conclusion then reached and refer to that opinion for the grounds of our decision.

71 The alleged error which was not considered in that opinion is, that the court below refused to admit in evidence the pleadings and judgment in an action between the parties to this action through which the railroad company recovered possession of a part of the property in controversy in 1878. In its complaint in that action the railroad company alleged that in May, 1873, "it became seized for the use and purpose of a right of way" of that portion of the property in question which is described in the complaint in that action and that the defendant in error, Smith, was unlawfully in possession of it as tenant of other parties who entered as trespassers and were defendants in that action. The defendant in error filed a general demurrer to that complaint. The company moved for judgment on the demurrer as frivolous, and it was granted on January 31, 1878. This was the record that was rejected by the court below as immaterial. Testimony tending to prove that the property described in that record was a part of the lots in controversy in this action was also offered and rejected by the court on the same ground.

The ground on which it is contended that these rulings are erroneous is that this record and testimony proved that the title to the property described in the complaint in that action was *res adju-*

*dicata* between the parties to this action, and that the judgment rendered in 1878 constituted a bar to the recovery of the property described in it by the defendant in error in this action. The argument is, that it was alleged in the complaint in that action that the railroad company was "seized in fee for the use and purpose of a right of way," of the real estate described in it, that the judgment was an adjudication that it was so seized and that that decision barred the defendant in error from contesting that question in this action. This view of the case, however, overlooks two decisive facts disclosed by this record—(1) that the defendant in error did not acquire the title on which he founds this action until more than a year after that judgment was rendered, and (2) that the question whether or not the railroad company was seized in fee or otherwise of the property in question was not put in issue and was not tried in the former action; the only question tried was that raised by the demurrer, whether or not the railroad company was entitled to possession of the property if it was seized in fee for the purpose of a right of way and the defendant was wrongfully in possession as the tenant of trespassers.

The general rule is that whenever the same question has been in issue, has been tried, and judgment has been rendered, that judgment is conclusive in a subsequent action between the same parties and their privies. This rule governs actions for the recovery of the possession of real estate in the State of North Dakota, for the fictions of the old action of ejectment at common law were abolished in that State and in the Territory which it succeeded before either of these actions was brought, and the real parties in interest were required by the code of that Territory and State to be the parties to these actions. Sections 33, 34, 74, 635, 651 Code of Civil Procedure of the Territory of Dakota (Revised Code of Dakota 1877), sections 4830, 4832, 4870, 5449-5465 Compiled Laws of Dakota 1887. But under this rule the former judgment is not conclusive of questions that could not have been and were not tried and determined between these parties in the earlier action. In actions for the recovery of real property under this code, the former judgment is a bar when the titles and defences are the same in both actions, but it is not a bar to a subsequent action or defence founded on a title that was not and could not have been interposed in the earlier action. Hence an action or defence founded upon a title acquired by either of the parties subsequent to the judgment, is in no way affected by it, because it could not have been tried or determined by the former judgment. A stranger to the earlier action could maintain against any of the parties to it any title or right which he held when the judgment was rendered or which he acquired subsequent to its date. Any of the parties to the action, therefore, may, after the judgment, acquire any right or title to the property he can obtain, and may maintain it, against the parties to the former action with the same force and effect as a stranger. A judgment in an action for the recovery of real property is not a bar to a subsequent action brought or defence interposed by either of the parties to it when that action or defence is founded on an





United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, }

*vs.*

PATRICK R. SMITH, Defendant in Error. }

74 Application is hereby made upon the affidavit of J. H. Mitchell, Jr., herewith submitted, for an order staying the sending down of the mandate in this cause to and including the 28th day of October, A. D. 1895.

C. W. BUNN AND

J. H. MITCHELL, JR.,

*Attorneys for Plaintiff in Error, N. P. R. R.,  
Gen'l Office Bldg., St. Paul.*

Endorsed: "U. S. circuit court of appeals, eighth circuit. N. P. R. R. Co. *vs.* Patrick R. Smith. Application for order staying mandate. C. W. Bunn and J. H. Mitchell, Jr. Filed Oct. 18, 1895. John D. Jordan, clerk."

And on the eighteenth day of October, A. D. 1895, an affidavit of J. H. Mitchell, Jr., in support of the application for order staying mandate was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, }

*vs.*

PATRICK R. SMITH, Defendant in Error. }

UNITED STATES OF AMERICA, }

*State of Minnesota, County of Ramsey, } ss:*

J. H. Mitchell, Jr., being first duly sworn, upon oath deposes and says that C. W. Bunn, who, at the time of the argument and presentation and rendition of judgment in the above-entitled cause in this court, was, ever since has been, and now is the counsel for the plaintiff in error, has had since the rendition of said judgment charge and direction of all matters pertaining to the determination of whether or not said cause should be appealed to the Supreme

75 Court of the United States and the suing out of writ of error for the prosecution of said appeal; that this affiant has ascertained that it has been ever since the rendition of said judgment and is now the purpose and intention of said plaintiff in error and the said C. W. Bunn, as counsel for the same, to prosecute an appeal to said cause by the suing out of a writ of error of the United States Supreme Court to the above-entitled court within the time which will allow the same to operate as a supersedeas, and that it was and is the purpose of said Bunn to look after and personally give direction to the suing of said writ of error.

That this affiant has been, ever since the rendition of said judgment, and is now, an assistant counsel for plaintiff in error, acting

in all matters pertaining to the handling of its business in court under the instructions and directions of said Bunn.

That said Bunn was on last Sunday, October 13th, in receipt of telegram, at St. Paul from New York, calling him to the latter city on important business; that said telegram was not received until within an hour or two of the departure of the last train on that day upon which he could take passage from St. Paul for New York; that he did not have time after receipt of said telegram and before leaving to communicate with this affiant or any other assistant or representative of plaintiff in error, or to leave any instructions with any representative relative to anything to be done in this said cause or any business of said plaintiff in error; that this affiant did not have in charge and has not had in charge, since the rendition of said judgment, any matters pertaining to the prosecution of appeal or suing out writ of error in this cause; that this affiant learned for the first time yesterday that the mandate in said cause was subject, under the rule of court, unless stayed by special order, to be sent down to the circuit court for the district of North Dakota at any time after this date; that this affiant, knowing that it was the purpose of said Bunn to sue out writ of error for the prosecution of said appeal, at once prepared an application for an order staying said

mandate, and has prepared the necessary form of bond and  
76 writ of error to be forwarded this day to the Supreme Court justice assigned to the eighth circuit for allowance; that said papers can be forwarded and application for and allowance of writ of error and issuance of same, with return of necessary papers to clerk of circuit court of appeals for record, file, and issuance, can all be done and performed within the time requested for the stay of said mandate, namely, until October 28th, 1895, and within the time required for the allowance and issuance of said writ of error to operate as a supersedeas; that said Bunn is this day engaged in the argument of an important cause, in which the plaintiff in error is a party, in the United States circuit court for the district of New York, and expects to return to St. Paul as soon as the hearing is concluded; that said Bunn was not aware at the time of his leaving that the time for the sending down of said mandate was so near at hand, and was acting upon the understanding that he would have sufficient time after his return for the suing out of said writ of error.

J. H. MITCHELL, JR.

Subscribed and sworn to before me this 18th day of October, A. D. 1895.

[SEAL.]

JOHN G. DRESEN,  
*Notary Public, Ramsey County, Minnesota.*

Endorsed: "No. 556. U. S. circuit court of appeals, 8th circuit. N. P. R. R. Co. vs. Patrick R. Smith. Affidavit of J. H. Mitchell, Jr., for stay of mandate. C. W. Bunn and J. H. Mitchell, Jr. Filed October 18, 1895. John D. Jordan, clerk."

77 And on the eighteenth day of October, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order staying the mandate in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term,  
1895.

FRIDAY, October 18, 1895.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in	}	No. 556.
Error,		
<i>vs.</i>		
PATRICK R. SMITH, Defendant in Error.		

In error to the circuit court of the United States for the district of North Dakota.

Upon application of counsel for plaintiff in error, and for good cause shown, it is hereby ordered that the sending down of the mandate in the above-entitled action from this court to the U. S. circuit court for the district of North Dakota be, and the same is hereby, stayed to and including the 28th day of October, A. D. 1895.

And on the nineteenth day of October, A. D. 1895, a motion to make receivers parties plaintiffs in error was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,	}
<i>vs.</i>	
PATRICK R. SMITH, Defendant in Error.	

78 Now come C. W. Bunn and J. H. Mitchell, Jr., counsel for the plaintiff in error in the above-entitled cause, suggesting to the court the fact of the appointment of E. H. McHenry and F. G. Bigelow as receivers of said plaintiff in error as made since the rendition of the judgment of affirmance in said cause in this court and prior hereto by the circuit courts of all the districts in said eighth circuit in which any property of said plaintiff in error is situated, and moves the court for an order joining said E. H. McHenry and F. G. Bigelow, receivers of the Northern Pacific Railroad Company, with the Northern Pacific Railroad Company, as parties plaintiffs in error in the above-entitled cause in this court, and for an order amending the record of said cause in this court, so that the same shall show the said E. H. McHenry and F. G. Bigelow as receivers of the Northern Pacific Railroad Company to be parties plaintiffs in error conjointly with said Northern Pacific Railroad Company.

C. W. BUNN,  
J. H. MITCHELL, JR.,  
*Counsel for Plaintiff in Error.*

United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error, }  
 vs.  
 PATRICK R. SMITH, Defendant in Error. }

Now, on this 19th day of October, 1895, upon motion of C. W. Bunn and J. H. Mitchell, Jr., counsel for plaintiff in error in this cause, it is hereby ordered that E. H. McHenry and F. G. Bigelow, receivers of the Northern Pacific Railroad Company, be, and hereby are, joined with the Northern Pacific Railroad Company as parties plaintiff in error in the above-entitled cause in this court, and that the record of said cause in this court be, and hereby is, amended so that the said E. H. McHenry and F. G. Bigelow, as receivers of the Northern Pacific Railroad Company, shall appear therein as parties plaintiff in error conjointly with said Northern Pacific Railroad Company.

Endorsed : " No. 556. U. S. circuit court of appeals, eighth circuit. N. P. R. R. Co. vs. Patrick R. Smith. Motion for order adding receivers as parties plaintiff in error. C. W. Bunn and J. H. Mitchell, Jr., att'ys for defendant, St. Paul, Minn. Filed October 19, 1895. John D. Jordan, clerk."

And on the nineteenth day of October, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order making receivers parties plaintiffs in error in the words and figures following, to wit :

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

SATURDAY, October 19, 1895.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in }  
 Error, } No. 556.  
 vs.  
 PATRICK R. SMITH, Defendant in Error. }

In error to the circuit court of the United States for the district of North Dakota.

This cause came on this day to be heard upon the motion of counsel for plaintiff in error to make additional parties herein, and it appearing to the court that E. H. McHenry and F. G. Bigelow have been appointed as receivers of the said Northern Pacific Railroad Company, it is now here ordered by this court that said E. H. McHenry and F. G. Bigelow, receivers, be, and they are hereby, made parties plaintiffs in error in this cause.

And on the fifteenth day of November, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals a supersedeas bond on writ of error in words and figures following, to wit:

80 United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, E. H. McHENRY and  
F. G. Bigelow, Receivers of the Northern Pacific Railroad Com-  
pany, Plaintiff- in Error, }

vs.

PATRICK R. SMITH, Defendant in Error. }

Know all men by these presents that we, said Northern Pacific Railroad Company, a corporation created by and existing under an act of Congress of the United States of America entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," approved July 2, 1864, and E. H. McHenry and F. G. Bigelow, receivers of said Northern Pacific Railroad Company, the above-named plaintiffs in error, by J. H. Mitchell, Jr., their counsel, as principal- and the American Surety Company of New York, a corporation duly organized and incorporated under the laws of the State of New York and authorized to do business in the State of Minnesota, as surety, are held and firmly bound unto the above-named Patrick R. Smith in the sum of fifty thousand (\$50,000.00) dollars, lawful money of the United States of America, to be paid to the said Patrick R. Smith, his executors, administrators, and assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, and the successors and assigns of said company, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas the above-named Northern Pacific Railroad Company and the said E. H. McHenry and F. G. Bigelow, as receivers of said Northern Pacific Railroad Company, have prosecuted a writ of error in the Supreme Court of the United States to the circuit court of appeals for the eighth circuit to reverse the judgment

81 rendered by said United States circuit court of appeals herein under date of August 19th, 1895, affirming the judgment of the circuit court of the United States for the district of North Dakota rendered under date of March 16th, 1894, in favor of said above-named Patrick R. Smith and against the said Northern Pacific Railroad Company:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company and the said E. H. McHenry and F. G. Bigelow, as receivers of said Northern Pacific Railroad Company, shall prosecute said writ of error to effect and answer all costs and damages if they shall fail to make good their

plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

NORTHERN PACIFIC RAILROAD  
COMPANY,

By J. H. MITCHELL, Jr., *Its Counsel.*

Signed in presence of—  
J. G. DRESEN.

E. H. MCHENRY AND  
F. G. BIGELOW,

*As Receivers of the Northern Pacific Railroad Company,*  
By J. H. MITCHELL, Jr., *Their Counsel.*

Signed in presence of—  
J. G. DRESEN.

E. H. MCHENRY AND  
F. G. BIGELOW,

*Receivers of the Northern Pacific Railroad Company,*  
By E. H. MCHENRY.

Signed in presence of—  
J. G. DRESEN.

AMERICAN SURETY COMPANY  
OF NEW YORK, [SEAL.]  
By DANIEL D. MERRILL,

*Resident Vice-President.*  
GEORGE B. EDGERTON,  
*Resident Assistant Secretary.*

Signed in presence of—  
A. M. WICKWIRE.  
G. P. O'NEALL.

82 The sufficiency of the surety of this bond approved this  
19th day of October, 1895.  
(Signed)

WALTER H. SANBORN,  
*Circuit Judge, 8th Circuit.*

Approved as a supersedeas this 23rd Oct., 1895.

(Signed)

DAVID J. BREWER,  
*Justice Supreme Ct.*

STATE OF MINNESOTA, }  
County of Ramsey, } ss:

Be it remembered that on the 19th day of October, A. D. 1895, before me personally appeared Daniel D. Merrill and George B. Edgerton, to me personally known, who, being by me severally sworn, say—the said Daniel D. Merrill says that he is the resident vice-president of the American Surety Company of New York, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors.



And the said George B. Edgerton says that he is the resident assistant secretary of said company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors.

And the said Daniel D. Merrill and the said George B. Edgerton each acknowledge the said instrument to be the free act and deed of said corporation.

[SEAL.]

A. M. WICKWIRE,  
*Notary Public, Ramsey County, Minn.*

Endorsed: "U. S. circuit court of appeals, eighth circuit. N. P. R. R. Co., E. H. McHenry & F. G. Bigelow, rec'rs N. P. R. R. Co., pl'ffs in error, vs. Patrick R. Smith, def't in error. Supersedeas bond. C. W. Bunn and J. H. Mitchell, Jr., attorneys for pl'ffs in error. Filed Nov. 15, 1895. John D. Jordan, clerk."

83 And on the fifteenth day of November, A. D. 1895, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

84 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company and E. H. McHenry and F. G. Bigelow, as receivers of said Northern Pacific Railroad Company, plaintiffs in error, and Patrick R. Smith, defendant in error, a manifest error hath happened, to the great damage of the plaintiffs in error, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, this 23d day of October, in the year of our  
 85 Lord one thousand eight hundred and ninety-five, and of the  
 Independence of the United States the one hundred and  
 nineteenth.

[Seal of the Supreme Court of the United States.]

JAMES H. MCKENNEY,  
*Clerk of U. S. Supreme Court.*

Allowed by—  
 DAVID J. BREWER,  
*Associate Justice Sup. Ct. U. S.*

*Return to Writ.*

UNITED STATES OF AMERICA, } ss :  
*Eighth Circuit,*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit  
 Court of Appeals, Eighth  
 Circuit.

In witness whereof I hereto sub-  
 scribe my name and affix the seal of  
 said court, at office in the city of St.  
 Louis, Missouri, this sixteenth day of  
 November, A. D. 1895.

JOHN D. JORDAN,  
*Clerk of the United States Circuit Court of  
 Appeals, Eighth Circuit.*

STATE OF MINNESOTA, } ss :  
*County of Ramsey,*

—, being duly sworn, says that he is an officer, to wit,  
 —, of the defendant herein; that he has read the foregoing  
 answer and knows the contents thereof, and that the same is true of  
 his own knowledge, except as to those matters therein stated on in-  
 formation and belief, and as to those matters he believes it to be  
 true.

Subscribed and sworn to before me this — day of —, A. D.  
 189—.

\_\_\_\_\_  
*Notary Public, Ramsey County, Minn.*

[Endorsed:] C. U. S. circuit court of appeals, eighth circuit.  
 Northern Pacific Railroad Company, Edwin H. McHenry, Frank  
 G. Bigelow, receivers Northern Pacific Railroad Company, pl'ffs  
 in error, vs. Patrick R. Smith, def't in error. Writ of error. C. W.  
 Bunn and J. H. Mitchell, Jr., attorneys for defendant, St. Paul, Minn.  
 Filed Nov. 15, 1895. John D. Jordan, clerk.

86 And on the fifteenth day of November, A. D. 1895, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the admission of service endorsed thereon, is hereto attached and herewith returned :

87 United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, E. H. McHENRY and  
F. G. Bigelow, Receivers of the Northern Pacific Railroad  
Company, Plaintiffs in Error, }

vs.

PATRICK R. SMITH, Defendant in Error.

To Patrick R. Smith, defendant in error, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, next, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Northern Pacific Railroad Company and E. H. McHenry and F. G. Bigelow, as receivers of said Northern Pacific Railroad Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 23rd day of October, A. D. 1895.

DAVID J. BREWER,  
*Associate Justice Supreme Court.*

[Endorsed :] C. Original. U. S. C. C. appeals, 8th circuit. N. P. R. R. Co., E. H. McHenry & F. G. Bigelow, rec'rs N. P. R. R. Co., pl'ffs in error, vs. Patrick R. Smith, def't in error. Citation. Due service of copy of within admitted this 26th day of October, A. D. 1895. Stevens, O'Brien, Cole & Albrecht, attorneys for defendant in error. Oct. 28. Filed Nov. 15, 1895. John D. Jordan, clerk.

88 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing eighty-seven pages contain a true transcript of the record, as printed by stipulation of the parties, upon which the case was heard in this court, and true and complete copies of all the proceedings and record entries, including the opinion of said circuit court of appeals, in the case of E. H. McHenry and F. G. Bigelow, receivers of the Northern Pacific Railroad Company, and Northern Pacific Railroad Company, plaintiffs in error, vs. Patrick R. Smith, defendant in error, No. 556, May term, 1895, as the same remain upon the files and records of said United States circuit court of appeals.

I further certify that the original writ of error and citation in said cause are hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this sixteenth day of November, A. D. 1895.

JOHN D. JORDAN,

*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

Endorsed on cover: Case No. 16,121. U. S. circuit court of appeals, eighth circuit. Term No., 391. The Northern Pacific Railroad Company *et al.*, plaintiffs in error, *vs.* Patrick R. Smith. Filed December 31, 1895.